(1)

91-696

NO. _____

Supreme Court, U.S.
FILED
OCT 3 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES WILSON,

Petitioner

versus

SECURITY INSURANCE CO.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Does a court reviewing arbitration proceedings have a constitutional duty under the 5th and 14th Amendments of the United States Constitution to require proof of the whole record presented in the arbitration proceedings before: a) finding that factual error occurred; b) entering final judgment, in lieu of a vacatur.

Parties to the proceeding:

Petitioner: James Wilson of Fairground Road, Woodbridge, Connecticut.

Respondent: Security Insurance Company, Hartford, Connecticut.

LIST OF CITATIONS

United States Citations

Burlington Truck Lines Inc. v. United States, 71 U.S. 156, 168-169, 9 L Ed 2d 207, 215, 83 S Ct 239 (1962) 26

Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402,419-420, 91 S Ct 814, 28 L Ed 136, 155 26

New Orleans v Dukes, 427 U.S. 297, 96 S Ct 2513, 49 L Ed. 2d 511 . .27

Federal Citations

Arkansas Power & Light, 725 F.2d 716 (D.C. Cir. 1984) 25

Bell Aerospace Co. v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974) 24

Fine v. Bear, Stearns & Co., 765 F.Supp 824,(S.D.N.Y. 1991) 25

Hoteles Condado Beach, LaConcha & Convention Center v.Union De Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985) 24

Konkar Maritime Enterprises. S.A. v.Compagnie Belge D'Affretement, 668 F.Supp. 267 (S.D.N.Y.) 24

Occidental Petroleum Corporation v. S.E.C., 873 F.2d 325, 338 . . .25

Sears v. Federal Savings & Loan,
775 F.2d 1038 (9th Cir. 1985) . .25

Teamsters Chauffers, Etc.v. E.D.
Clapp Corp. 551 F.Supp 570,
578,(N.D.N.Y.) Aff'd 742 F.2d
1441 (2d Cir. 1983) 25

Connecticut Cases

Aetna Life & Casualty Co. v.
Bulaong, 218 Conn. 51, 64,
A.2d (1991) 22

Blue Sky Bar, Inc. v Stratford,
203 Conn 14, 27, 523 A.2d 467 . .27

Chmielewski v. Aetna Casualty &
Surety Co., 218 Conn. 646,
A.2d ___. (1991) . . . 18,22,23,24

Nationwide v. Gode, 187 Conn.
386, 446 A.2d 1059 19

Pecker v Aetna Casualty and
Surety Co., 171 Conn. 443, 370
A.2d 1006 18,19,20,21

Safeco v. Vetre, 174 Conn. 329,
387 A.2d 539 19,20,21

Secondino v. New Haven Gas Co.,

147 Conn. 672, 165 A.2d 598 . .26

Styles v Tyler, 64 Conn 432, 30
A 165 27

Wilson v. Security, 199 Conn.
618, 509 A.2d 467 11

Statutes, Regulations

C.G.S. 38-175c 11

Regulation 38-175a-6 18

28 USC §1257(a) 8

Reference to Orders and Opinions below:

A. Orders for judgment for respondent entered July 9, 1991, granting motion of Respondent dated 06/10/91, and denying cross-motion of petitioner for vacatur of arbitration award. Appendix p. 1-11.

B. Decision of Supreme Court of Connecticut, 213 Conn. 532, 569 A.2d 40 dated 1/30/90. Appendix p. 12.

C. Decision upon motion for reargument, Order without opinion dated 2/21/90. Appendix p. 51

D. Opinion of Arbitration Panel, dated 07/25/88: Appendix p. 36,

E. Dissenting opinion of Arbitrator dated 07/22/88: Appendix p. 40

F. Memorandum of Superior Court sustaining award for Petitioner, dated 12/09/88: Appendix p. 20.

Order Denying Prior Petition for Certiorari to The United States Supreme Court

Cert. Denied: 89-1808, October 1, 1990, 111 S Ct 52.

(Entered prior to denial of Motion for Vacatur of Arbitration Award and Order of Judgment for Respondent.)

Jurisdictional Statement.

Grounds: The Due Process clause of the United States Constitution requires that judicial review be made upon the entire record. Petitioner's rights to due process of law in arbitration proceeding are violated by a review process resulting in a final judgment for the respondent without vacating the arbitration award after proceedings in which the respondent-plaintiff elected not to offer proof of the record in arbitration and successfully objected to proof of such record offered by petitioner. Petitioner's constitu-

tional objections duly made and preserved.

i. Date of Judgment or decree sought to be reviewed: Order of Connecticut Supreme Court directing the entry of final judgment for respondent: July 9, 1991. Prior decision of Connecticut Supreme Court: January 30, 1990.

ii. Statutory provision believed to confer jurisdiction in this court to review the judgment or decree by Writ of Certiorari: 28 USC §1257(a).

G. Constitutional Provisions.

Amendments to Constitution of the United States.

ARTICLE V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

ARTICLE XIV

"Section 1. All persons born or natu-

ralized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

H. Concise Statement of Case

Wilson, a police officer, sustained serious personal injury while on duty when struck by an uninsured motor vehicle. The respondent Security Insurance Co. had issued an Automobile Insurance policy to the "Town of Woodbridge, et al" with uninsured and underinsured motorist coverage as mandated by C.G.S. 38-175c. Unable to agree as to the amount payable, Wilson made demand for arbitration under the provisions in the policy. Respondent's refusal to arbitrate led to the first appeal to the Supreme Court which decided that respondent was required to submit to arbitration, that coverage issues must be presented to arbitration by statute. Additionally the court announced that the insurance company was entitled to "review de novo" after the decision on coverage by the arbitration panel. Wilson v. Security, 199 Conn. 618, 509 A.2d 467.

The parties proceeded to arbitration. After hearing the majority made a finding and award on July 25, 1988, for Wilson. Appendix p.36. One arbitrator dissented, on grounds that did not include the stacking issue determined on appeal. Appendix p. 40

Respondent Security Insurance Co. filed an application to vacate the award on August 18, 1988 alleging the arbitrators violated state law without setting forth in the application its grounds, praying remand to arbitration for an order "in conformity with the opinion of dissenting arbitrator. Appendix p 48. The application attached the policy and the Award and the Dissenting Opinion. No transcript or other record of the evidentiary proceedings in arbitration were filed. Amendment to that Petition was filed September 12, 1988 alleging error in permitting the stacking of coverage.

At the hearing on the application to vacate the award on September 19, 1989 before the Superior Court, Security Insurance Co. proceeded claiming that the only evidence needed was the policy and decisions of the arbitrators, that evidence heard by the arbitrators was irrelevant and not offered. Appendix p. 72-74, 78. Wilson claimed that the evidential record before the arbitrators was necessary. Appendix 75-76, 78. Wilson claimed that his right to have the court hear the nature of the evidence presented to the arbitrators was protected by the Fifth and Fourteenth Amendments to the United States Constitution, Appendix p.83, and that this right prevented the Security from succeeding without any evidential record. Appendix 83. The trial court ruled that the burden of presenting the evidential record was upon respondent,

Security Insurance Co. Appendix 74-75, 78 Wilson made offer to present evidence as to the content of the hearing before the arbitrators. Appendix 80, 83.

The Superior Court on December 8, 1988 found for Wilson on the Motion to Vacate. Appendix p.20, In its memorandum, the Trial Court found:

> "The Security Insurance Co. offered no record to this Court that the finding of the arbitrators was not supported by the evidence.
> The Security Insurance Company by its objection to the offer of proof by Wilson confined the proceedings before this court on the record yet offered no proof by the record before the arbitrators to reject their findings."

and entered judgment for Wilson. Appendix p.33.

The Security Insurance Company appealed to the Supreme Court of Connecticut, assigning error that the decision of the trial court erred in upholding the award insofar as it permitted stacking of coverages.

Wilson preserved the federal claim by his Preliminary Counter-Statement of Issues on Appeal, also claiming Security had abandoned or waived the right to review by not presenting to the record evidence of the matters heard by the arbitrators and that such failure would violate petitioner's due process rights under the United States Constitution if respondent's claims were allowed. Appendix p.83-84.

Wilson's Brief to the Supreme Court of Connecticut, stated that the provisions of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution were relied upon and had been relied upon in the trial court. Wilson's Brief, Appendix 53-61, 61-65; in particular at 53, 64. The failure of Security to present the record before the arbitrators and its objection to Wilson supplying

evidence of the proceedings before the arbitrators was claimed to be a denial of due process of law under the United States Constitution. Wilson's Brief, Appendix p. 51-53, 61-65.

On January 30, 1990 the Supreme Court reversed the trial court based upon a presumptive finding as to factual expectations of the parties to the contract of insurance and hypothetically multiplying coverage risks in manner not found by arbitrators.

The Supreme Court of Connecticut did not in its decision refer to federal questions resulting from failure to produce in the trial court evidence of the record before the arbitrators, nor to constitutional claims made by Wilson as to due process of law.

On February 8, 1990, petitioner Wilson filed a Motion for reargument and in-

cluded as the primary grounds stated as follows: "Did the decision violate James Wilson's rights under the Contract Clause and to due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sec. 10 of the Constitution of Connecticut by ....B) by failure to conduct review de novo based upon the full record of proceedings in arbitration over objection, ..." .

Motion to Rearque denied February 21, 1990 without opinion.

Petitioner had argued that the rights of the parties under the contract had to be determined by evidence and by the terms of the contract, which were legally permissible under the regulations and statutes of the State of Connecticut.

In 1972, the Connecticut Supreme Court had held that the Minimum Regulations of

the State of Connecticut governing uninsured motorist coverage, Regulation 38-175a-6 did not authorize or permit the inclusion in insurance policies of "other insurance" provisions to limit or exclude coverage. Pecker v Aetna Casualty and Surety Co., 171 Conn. 443, 370 A.2d 1006. The attempt to include a provision not authorized by regulation was void. Reaffirmed: Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, at page 674, ___ A.2d ___. (1991) The insurance policy involved in Pecker was construed without reference to a void proviso. In 1975 the Connecticut Supreme Court held that a single policy issued to cover more than one vehicle with separate listings of vehicles, separate premium charges for each vehicle and separate coverages for each vehicle required separate stackable coverages for persons insured in respect

to each vehicle so insured. Safeco v. Vetre, 174 Conn. 329, 387 A.2d 539. In the year 1986 in Nationwide v. Gode, 187 Conn. 386, 446 A.2d 1059, the Supreme Court of Connecticut followed the decisions of Pecker and Safeco after legislative amendments of 1979. In Nationwide, the court indicated that it would look to the intention of the parties to the contract and reviewed the contract language to determine the intent of the parties. In Nationwide the dissenting opinion noted that arguments directed toward the intent of the parties would require review of the actuarial expectations based upon proof of premium receipts and the profit and loss ratios. In a footnote to Nationwide decision the Supreme Court reserved decision as to the effect upon policies issued for fleet coverage.

The policy issued by Security Insurance

Co. issued to "The Town of Woodbridge, et al" contained a form of uninsured motorist coverage in the policy which was identical to the form used for the family automobile policy, defining the term "who is insured" as "1. You or any family member". The uninsured motorist coverage defined the term family member and contained other provisions that tracked the types of policies used for coverage in Pecker and Safeco.

The Connecticut legislature vested the fact-finding powers with the arbitrators. They had the original jurisdiction to take evidence as to the intentions of the parties. Such evidence might have included negotiations between the parties, the actuarial expectations of the insurance company based upon calculations actually used to set premiums, and advice to underwriting departments from legal advi-

sors along with knowledge of statutory-regulatory requirements. The process of proceeding to final judgment for respondent without review of a whole record is prejudicial to petitioner. The process presumes the record did not support the arbitrators decision was correct upon the issues presented to them. Due process should not allow the taking of judicial notice of a rebuttable fact during appellate review. Review of isolated charges for insurance premiums does not establish industry practice nor set the limits of expectations. Respondent insurance company selected a form for uninsured motorist coverage identical to that used for a family automobile policy. It should have structured its premiums according to the expectations derived from Pecker and Safeco or changed its policy. The petitioner is prejudiced by a record that

does not even show industry practices. Reasonable expectations are that premium charges are intended to induce business by beating the competition. With evidence at trial restricted, the Petitioner is prejudiced by inability to show that more than one policy was disclosed to the Arbitrators, and that the credit of $74,000.00 now taken to reduce coverage to zero dollars was apportionable and not solely for the respondent, and when apportioned, does not reduce coverage to zero. The petitioner is aggrieved when the court did not vacate the order of the arbitrators instead of entering judgment for the respondent, contrary to precedent. See: Aetna Life & Casualty Co. v. Bulaong, 218 Conn. 51, 64, _____ A.2d _____ (1991), fn 11. Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, at page 680, ___ A.2d ___: holding vacatur is the

remedy when proof of facts is required. None of the arbitrators found for the insurance company on the stacking issue based upon the record before them.

Under Connecticut law determination of whether the coverage was that that of a family policy or a business policy was a factual issue on which a party has opportunity to present evidence to arbitrators for decision. Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, at page 667, ___ A.2d ___. Under Connecticut law a review of arbitration proceeding must be based upon a transcript of the record. Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, supra at pg. 661, 663, 666, ___ A.2d ___. The arbitrator's decision is presumptively correct and subject to rebuttal only by "clear preponderance of the evidence". Chmielewski v. Aetna Casualty & Surety

Co., 218 Conn. 646, at page 665, ___ A.2d ___. The decision of arbitrators cannot be substituted for by an initial judicial determination of coverage. Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, at page 680, ___ A.2d ___.

Federal Courts have recognized, implicitly or explicitly, that the standard of review in respect to arbitration or administrative hearings requires examination of the entire record. The arbitrators decision must be based upon full and fair consideration of the entire evidence. Hoteles Condado Beach, LaConcha & Convention Center v. Union De Tronquistas Local 901, 763 F.2d 34, (1st Cir. 1985). Vacatur is appropriate when exclusion of relevant evidence deprives a party to a fair hearing. Bell Aerospace Co. v. Local 516, 500 F.2d 921, 923, (2d Cir. 1974); Konkar Maritime Enterprises, S.A.

v. Compagnie Belge D'Affretement, 668 F.Supp. 267, (S.D.N.Y.); Teamsters Chauffers, Etc. v. E.D. Clapp Corp. 551 F.Supp 570, 578, (N.D.N.Y.) Aff'd 742 F.2d 1441, (2d Cir. 1983); Fine v. Bear, Stearns & Co., 765 F.Supp 824, (S.D.N.Y. 1991). To allow meaningful judicial review, the record of proceedings must be produced. Occidental Petroleum Corporation v. S.E.C., 873 F.2d 325, 338; Sears v. Federal Savings & Loan, 775 F.2d 1038, (9th Cir. 1985). Facts found by administrative body must have some basis in the record. Arkansas Power & Light, 725 F.2d 716, (D.C. Cir. 1984). Generally, judicial review of administrative action is limited to review of the record on which the administrative board decision was based.

The United States Supreme Court has found that in review of administrative

hearings, the "whole record" is necessary for plenary review. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 419-420, 91 S Ct 814, 28 L Ed 136, 155, citing: Burlington Truck Lines Inc. v. United States, 71 U.S. 156, 168-169, 9 L Ed 2d 207, 215, 83 S Ct 239 (1962).

Wilson urges the granting of certification for the purpose of preserving rights established after and upon full evidential hearing. The "reasonable expectations of the parties" cannot be reached after examination of one document selected solely by the Insurance Company. Consequently the Court acted without knowledge as to whether the insurance company waived rights in arbitration. Secondino v. New Haven Gas Co., 147 Conn. 672, 165 A.2d 598. Failure to produce evidence permits an inference evidence not produced is unfavorable.

The Connecticut Supreme Court has no fact-finding authority. Styles v Tyler, 64 Conn 432, 30 A 165, and does not sit as a super legislature. Blue Sky Bar, Inc. v Stratford, 203 Conn 14, 27, 523 A.2d 467; New Orleans v Dukes, 427 U.S. 297, 96 S Ct 2513, 49 L Ed. 2d 511.

Respectfully submitted

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Admitted June 13, 1986

Certificate of Service

I, Peter B. Reilly, do hereby certify that the foregoing Petition for Certiorari together with the Appendix thereto was duly deposited in the United States Mail, postage prepaid, on the day of October, 1991, addressed to:

Susan M. Cormier, Esq.
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Peter B. Reilly
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91-696

(2)

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES WILSON,

Petitioner

versus

SECURITY INSURANCE CO.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX
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SUPREME COURT
STATE OF CONNECTICUT
13618

SECURITY INSURANCE COMPANY
VS.
JAMES WILSON

JULY 9, 1991

O R D E R

THE MOTION OF SECURITY INSURANCE COMPANY, FILED JUNE 10, 1991, FOR EXERCISE OF SUPERVISORY POWERS, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D GRANTED. THE TRIAL COURT IS HEREBY INSTRUCTED TO ENTER JUDGMENT FOR SECURITY INSURANCE COMPANY.

BY THE COURT

_____
DEPUTY CHIEF CLERK

SUPREME COURT
STATE OF CONNECTICUT

13618

SECURITY INSURANCE COMPANY
VS.
JAMES WILSON JUNE 10, 1991

MOTION FOR EXERCISE OF SUPERVISORY POWERS

Pursuant to P.B.§4183, Security Insurance Company requests the Supreme Court to exercise its supervisory powers over the trial court by ordering it to render judgment for Security in conformity with its decision in Wilson v. Security Ins. Co., 213 Conn. 532, 569 A.2d 40 (1990).

1. Brief History

This is an uninsured motorist case in which the majority of an arbitration panel awarded the claimant James Wilson $165,966.61. Security Insurance Company filed an application to vacate the award and Wilson filed an application to correct the award. The trial court denied

both applications. Security appealed and Wilson cross appealed from the respective judgments. The Supreme Court found error on the appeal and no error on the cross appeal. The case was remanded to the trial court with direction to vacate the judgment and to modify the arbitration award to reflect underinsured motorist coverage in the amount of $40,000. On March 19, 1990, the trial court (Fracasse, J.), vacated the judgment and modified the award to reflect coverage of $40,000. The trial court refused to render judgment for Security Insurance Company, on the basis that the rescript did not authorize it to do so. Security then filed a Motion for Judgment on March 19, 1990 which the trial court denied for the same reason on March 25, 1991.[1] Security has this date filed an appeal from that denial, but has also filed this

motion in an attempt to have this matter conclude as expeditiously as possibly.

2. Specific Facts

The original arbitration award found that (1) coverage equalled $240,000., (2) damages exceeded that amount and (3) the insurance company was entitled to a set-off of $74,033.39 in workers compensation benefits. As a result, the claimant was awarded $165,966.61 (240,000-74,033.39). Wilson challenged the workers' compensation credit in his application to correct the award and subsequently on his cross appeal to the Supreme Court. The Supreme Court found no error on the cross appeal, thereby affirming the arbitration award to the extent of the credit. As a result of the Supreme Court's decision on the appeal, coverage in the award was reduced to $40,000. Since the credit exceeds the

amount of coverage available by $33,033.39, Wilson is not entitled to any payment from Security.

At the hearing on the remand, Security requested the trial court to render judgment in its favor. When the court declined to do so, Security filed a Motion for Judgment. The court then stated that "it may be a question of looking at the award, bearing in mind the effect of the remand and whether or not the calculations are in accordance with the finding of error in the appeal and no error on the cross appeal." (tr. 3/19/90, p. 8). A copy of that transcript is attached as Appendix A.

Wilson opposed the motion on the grounds that he was entitled to relitigate the issue of the workers' compensation credit in that Security was erroneously given the full credit rather than a

partial credit. The trial court ultimately decided the motion for judgment and merely repeated its original decision vacating the judgment and modifying the arbitration award to reflect underinsurance motorist coverage in the amount of $40,000.00 (Appendix B).

3. Legal Grounds

This case must be concluded. As a result of the Court's decision on the appeal of this case, coverage equals $40,000. and the setoff equals $74,033.30. Simple arithmetic indicates that Wilson is not entitled to payment since the setoff exceeds the award. Indeed, on page 5 of Wilson's motion to rearque the Supreme Court decision, he concedes that as a result of the decision he is not entitled to any payment because the setoff exceeds coverage.

Res judicata bars relitigation of the

workers' compensation setoff. Gagne v. Norton, 189 Conn. 29, 453 A.2d 1162 (1983); Corey v. Avco-Lycoming Division, 163 Conn. 309, 307 A.2d 155 (1972).

The trial court apparently thought it lacked jurisdiction to render judgment for Security. The court's reading of the remand is too technical. "In carrying out the direction of the mandate as interpreted in the light of the opinion, (citations omitted.)" Hartford National Bank & Trust Co. v. Tucker, 195 Conn. 218, 222, 487 A.2d 528 (1985) (emphasis added). In Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, 680, A.2d. (1991) this Court held that a trial court has ample authority to make undisputed mathematical calculations in an uninsured motorist arbitration award where there is error in the arbitrator's legal determination but the factual

findings have been upheld. That is precisely what occurred here.

The trial court's refusal to enter judgment for Security has left the insurance company in limbo with an arbitration award which provides for coverage of $40,000, and a workers' compensation credit of $74,033.39, yet awards Wilson $165,966.61. That makes no sense. Security is entitled to judgment. That is the effect of the Supreme Court's opinion and remand. Security seeks a specific entry of judgment, however, in view of Wilson's intent to relitigate the workers' compensation setoff as evidenced by his objection to the motion for judgment and his motion for remand to the arbitrators.[2]

Although Security has filed an appeal from the trial court's decision, it is asking this Court to exercise its

supervisory powers to order the trial court to enter judgment for Security as a more appropriate and expeditious means of concluding this matter.

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[1]/ The motion for judgment was filed but not pursued until the United States Supreme Court denied Wilson's petition for certification.

[2]/ Wilson has since withdrawn his motion for remand, conceding that under Chimielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, .2d (1991) he cannot obtain a remand to the same arbitrators which originally heard the case.

PLAINTIFF, SECURITY INSURANCE GROUP
a/k/a ORION GROUP, INC.

By _____

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SUPREME COURT
STATE OF CONNECTICUT
13618

SECURITY INSURANCE COMPANY
VS.
JAMES WILSON JUNE 17, 1991

CROSS MOTION
FOR EXERCISE OF SUPERVISORY POWERS

Pursuant to P.B. §4183, James Wilson requests the Supreme Court to exercise its supervisory powers over the trial court by ordering it to render judgment for Security according to the statute and its prayer for relief, in conformity with the decision in Wilson v. Security Ins. Co., 213 Conn. 532, 569 A.2d 40 (1990); to wit: that the arbitration award be vacated.

(Practice Book 4041 statement omitted)

SUPREME COURT
STATE OF CONNECTICUT
13618

SECURITY INSURANCE COMPANY
VS.
JAMES WILSON JULY 9, 1991

O R D E R

THE CROSS MOTION OF JAMES WILSON, FILED JUNE 19, 1991, FOR EXERCISE OF SUPERVISORY POWERS, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED. THE REQUEST FOR HEARING IS ALSO DENIED.

BY THE COURT

DEPUTY CHIEF CLERK

mium paid for each vehicle. If $40,000 of coverage is considered inadequate, the appropriate response is simply to buy more coverage.

There is error, the matter is remanded to the trial court with direction to vacate the judgment and to modify the arbitration award to reflect underinsured motorist coverage in the amount of $40,000.

In this opinion the other justices concurred.

JAMES WILSON *v.* SECURITY INSURANCE COMPANY
(13614)

SECURITY INSURANCE COMPANY *v.* JAMES WILSON
(13618)

PETERS, C. J., HEALEY, CALLAHAN, GLASS and COVELLO, Js.

S Co., the defendant in the first case and the plaintiff in the second case, appealed from the judgment of the trial court confirming an arbitration award to W, the plaintiff in the first case and the defendant in the second, based on the "stacking" of the $40,000 uninsured motorist coverage applicable to each of six vehicles insured under a fleet automobile liability policy issued by S Co. W cross appealed challenging the subtraction of previously paid workers' compensation benefits from the maximum available amount of uninsured motorist benefits. *Held:*

1. "Stacking" of uninsured motorist coverage is inappropriate in the context of a fleet automobile liability policy; the matter was, therefore, remanded with direction to render judgment modifying the award to reflect coverage in the amount of $40,000.
2. The trial court did not err in denying the application by W to correct the portion of the arbitrators' decision reducing the award by previously paid workers' compensation benefits; the statute (§ 38-175c) requiring automobile liability policies to provide uninsured motorist coverage contains no mandate that such benefits not be reduced.

Argued November 1, 1989—decision released January 30, 1990

Application, in the first case, to correct an arbitration award and application, in the second case, to vacate that award, brought to the Superior Court in the judicial district of New Haven, where the cases were consolidated and tried to the court, *Meadow, J.*; judgment

denying the application to correct, from which James Wilson appealed, and judgment denying the application to vacate, from which Security Insurance Company appealed and James Wilson cross appealed. *Error on the appeal, further proceedings; no error on the cross appeal.*

The appellant-appellee and the appellee-appellant filed motions for reargument which were denied.

David M. Reilly, with whom was *Peter B. Reilly,* for the appellant-appellee (James Wilson).

Susan M. Cormier, with whom was *Wesley W. Horton,* for the appellee-appellant (Security Insurance Company).

COVELLO, J. These consolidated appeals followed a judgment of the trial court confirming an uninsured motorist arbitration award. The principal issue is whether coverage for uninsured motorists contained in a fleet automobile liability policy may be combined or "stacked" in determining the total amount of coverage available to a single claimant. We conclude that such a result is beyond the reasonable expectations of the parties to the insurance contract and that "stacking" is inappropriate in the context of fleet automobile liability policies. We therefore remand the matter to the trial court with direction to modify the award accordingly.

The relevant facts are not in dispute. On January 1, 1982, the defendant, Security Insurance Company, had in force a business automobile liability policy insuring thirty-one vehicles owned by the town of Woodbridge. The policy contained an endorsement providing uninsured motorist coverage in the amount of $40,000 for each vehicle. Each vehicle was separately listed on the policy. The policy also contained a separate schedule of premiums for each vehicle that included a $3 or $5 charge per vehicle for the $40,000 of uninsured motorist

coverage. The town paid a total of $137 for the uninsured motorist coverage on all thirty-one vehicles. The policy further contained a provision declaring that any sums payable under the uninsured motorists endorsement to the policy would be reduced by "[a]ll sums paid or payable under any workers' compensation . . . law."

On January 1, 1982, the plaintiff, James Wilson, was a Woodbridge police officer who was assigned to operate a police car that was covered by the defendant's policy. While on duty, and while standing in the vicinity of his parked vehicle, the plaintiff was struck and severely injured by a hit and run motorist.

Unable to agree on either the amount of uninsured motorist coverage available under the defendant's policy or whether the plaintiff was even covered by the policy, the parties submitted the issues to arbitration. They stipulated that the total value of the plaintiff's claim was $350,000, that the sum of $74,033.39 had been paid in workers' compensation benefits, and that "stacking" of coverage, if applicable, was limited to the six vehicles assigned to the police department. The arbitration panel concluded that the plaintiff was a "Named Insured" under the policy and that its uninsured motorist provisions were applicable to him. The panel further concluded that, since the six vehicles were listed on the policy and a separate premium charged for each, "stacking" of the insurance coverage was proper. From the $240,000 maximum limit available (six vehicles X $40,000), the panel subtracted $74,033.39 in previously paid workers' compensation benefits. It concluded, therefore, that the plaintiff was due the sum of $165,966.61.

The defendant filed an application in Superior Court seeking to set aside the arbitration award in its entirety

pursuant to General Statutes § 52-418.[1] The plaintiff filed a separate application seeking to correct only that portion of the decision that reduced the award by the amount of the previously paid workers' compensation benefits. The trial court, *Meadow, J.*, confirmed the award in its entirety and rendered judgment denying both applications. The defendant appealed and the plaintiff cross appealed to the Appellate Court. We thereafter transferred both matters to ourselves pursuant to Practice Book § 4023.

On appeal, the defendant claims that the trial court erred in concluding: (1) the plaintiff was a "named insured" under the policy; and (2) "stacking" was permitted in the context of fleet automobile liability policies. In view of our conclusion that the trial court erred by allowing the "stacking" of the fleet automobile uninsured motorist coverage, we need not address the first issue raised.

In *Cohn* v. *Aetna Ins. Co.*, 213 Conn. 525, 569 A.2d 541 (1990), we examined the applicability of "stacking" principles in the context of fleet insurance contracts. We defined such a contract as "any insurance policy designated as a 'fleet' or 'garage' policy, or any insurance policy covering a number of vehicles owned by a business, a *governmental entity*, or an institution." (Emphasis added.) Id., 530. We concluded that "[t]he notion of 'stacking' as an objectively reasonable expectation of the parties [did] not . . . extend to fleet insurance contracts." Id. The reason was that it was simply not credible that "a company or an

[1] General Statutes § 52-418 provides: "(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any one of the following defects . . . (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

employee of a company having a fleet of . . . vehicles would reasonably expect the coverage on [any one vehicle] at the time of the collision with an uninsured [or underinsured] motorist to be [a multiple of the total number of vehicles in the fleet] . . . ." *Linderer* v. *Royal Globe Ins. Co.*, 597 S.W.2d 656, 661 (Mo. App. 1980).

In the present case, the town of Woodbridge held a fleet policy insuring thirty-one vehicles. Each vehicle had uninsured motorist coverage with stated limits of $40,000. If "stacking" were permitted, $40,000 times thirty-one vehicles would produce $1,240,000 of uninsured motor vehicle coverage available for *each* vehicle. Followed to its logical conclusion, this would mean that the town of Woodbridge had purchased a total of $38,440,000 worth of uninsured motorist coverage for a premium of $137. " ' "Clearly such an expectation would not have been a reasonable one under the terms of the commercial fleet policy here in question." ' *Ohio Casualty Ins. Co.* v. *Stanfield*, 581 S.W.2d 555, 559 (Ky. 1979), quoting *Lambert* v. *Liberty Mutual Ins. Co.*, 331 So. 2d 260, 265 (Ala. 1976) . . . ." *Cohn* v. *Aetna Ins. Co.*, supra, 531. Even the present parties, in their unexplained stipulation limiting "stacking" principles to the six vehicles assigned to the Woodbridge police department, seemed to have sensed that the proposition is simply unsupportable when applied to large numbers of vehicles.

In his cross appeal, the plaintiff claims that the trial court erred in allowing the defendant a credit for workers' compensation benefits already paid to him in determining the amounts due under the uninsured motorist coverage. The plaintiff concedes, as he must, that the uninsured motorists endorsement to the policy here in issue contained a specific provision reducing any amounts payable under the uninsured motorists endorsement by any sums paid under the workers' compensa-

tion laws.[2] Further, § 38-175a-6 (d) of the Regulations of Connecticut State Agencies specifically authorizes uninsured motorist benefits to be reduced by the amount of such payments.[3]

The plaintiff argues, however, that: (1) his *damages* are for pain, suffering, disability, and loss of earning capacity, none of which are recoverable under the workers' compensation laws, and therefore, his damages have not been paid and thus, no reduction in uninsured motorist coverage is required under § 38-175a-6 (d); and (2) General Statutes § 38-175c, the statute requiring uninsured motorist coverage, provides a minimum limit of $20,000 for such coverage, a base amount, the plaintiff contends, which cannot be further eroded by the setoffs contained in § 38-175a-6 (d). To the extent that such setoffs exist, the plaintiff claims that the commissioner was without authority to adopt such a regulation, which is contrary to the minimum coverage required by § 38-175c. We do not agree.

[2] The uninsured motorists insurance endorsement provides under "E. OUR LIMIT OF LIABILITY" that "[a]ny amount payable under this insurance shall be reduced by . . . All sums paid or payable under any workers' compensation . . . law . . . ."

[3] Section 38-175a-6 of the Regulations of Connecticut State Agencies provides in relevant part: "MINIMUM PROVISION FOR PROTECTION AGAINST UNINSURED MOTORISTS . . . . (d) LIMITS OF LIABILITY. The limit of the insurer's liability may not be less than the applicable limits for bodily injury liability specified in subsection (a) of § 14-112 of the general statutes, except that *the policy may provide for the reduction of limits to the extent that damages have been* (1) paid by or on behalf of any person responsible for the injury, (2) *paid or are payable under any workers' compensation or disability benefits law*, or (3) paid under the policy in settlement of a liability claim. The policy may also provide that any direct indemnity for medical expense paid or payable under the policy or any amount of any basic reparations benefits paid or payable under the policy will reduce the damages which the insured may recover under this coverage and any payment under these coverages shall reduce the company's obligation under the bodily injury liability coverage to the extent of the payment." (Emphasis added.)

We see nothing in the language of regulation § 38-175a-6 (d) that quantifies the kinds of damages that must be paid before a valid reduction in uninsured motorist benefits may occur by reason of any payments made pursuant to the workers' compensation law. If damages are paid pursuant to the workers' compensation law, the uninsured motorist coverage may be reduced accordingly. General Statutes § 38-175c contains no mandate that uninsured motorist coverage benefits may not be reduced.

As we have earlier observed, "[t]he plain words of the statute . . . [§ 38-175c] simply require that each policy provide a minimum level of uninsured motorist coverage 'for the protection of persons insured thereunder.' The statute does not require that uninsured motorist coverage be made available when the insured has been otherwise protected . . . or when the uninsured motorist has other resources available to protect the insured. Nor does the statute provide that the uninsured motorist coverage shall stand as an independent source of recovery for the insured, *or that the coverage limits shall not be reduced under appropriate circumstances.* The statute merely requires that a certain minimum level of protection be provided for those insured under automobile liability insurance policies; the insurance commissioner has been left with the task of defining those terms and conditions which will suffice to satisfy the requirement of 'protection.' " (Emphasis added.) *Roy* v. *Centennial Ins. Co.*, 171 Conn. 463, 472–73, 370 A.2d 1011 (1976).

"Section 38-175c does not specifically prohibit the adoption of a regulation permitting the reduction of uninsured motorist coverage, whereas § 38-175a explicitly authorizes the commission to adopt regulations relating 'to the insuring agreements, exclusions, conditions and other terms applicable to . . . uninsured motorists coverages.' In the construction of stat-

utes, great deference is to be accorded to the construction given the statute by the agency charged with its enforcement." Id., 473. We are also mindful of the proposition that the legislature is presumed to be aware of the judicial construction placed upon its enactments; *Nationwide Ins. Co.* v. *Gode*, 187 Conn. 386, 395 n.7, 446 A.2d 1059 (1982); and despite our earlier observations concerning the purport of these statutes, we find no amendments that would support a contrary construction.

"The automobile liability insurance business is one which is extensively regulated; *Simonette* v. *Great American Ins. Co.*, 165 Conn. 466, 473, 338 A.2d 453 [1973]; and judicial revision of the terms upon which such policies are issued may produce extensive repercussions throughout the insurance industry of the state. In view of the very broad grant of regulatory authority to the insurance commissioner, we are not persuaded that the commissioner was without authority to adopt regulation § 38-175a-6 (d)." *Roy* v. *Centennial Ins. Co.*, supra.

There is error on the appeal and the matter is remanded to the trial court with direction to vacate the judgment and to modify the arbitration award to reflect underinsured motorist coverage in the amount of $40,000; there is no error on the cross appeal.

In this opinion the other justices concurred.

Superior Court,
Judicial District of New Haven.
No.274616
James Wilson v. Security Insurance Co.
No.274461
Security Insurance Co. v. James Wilson
Dated 12/08/88
Filed 12/09/88

MEMORANDUM OF DECISION

The above recited matters are before the court on a motion to correct an arbitration award in Wilson v. Security Insurance Co., Docket Number 274616 and a motion to vacate an arbitration award in Security Insurance Co. v. Wilson, Docket number 274461.

FACTS

The two member majority of the arbitration panel in this uninsured motorist case found that on January 1, 1982, the defendant was employed by the Woodbridge Police Department. The plaintiff, the respondent in the arbitration proceeding, had in force an insurance policy no. BA-21-50 (SAR) covering 31 vehicles owned by

the Town of Woodbridge providing uninsured motorist coverage with stated limits of $40,000.00. The declaration of the policy issued was to "The Town of Woodbridge, et al."

The majority of the panel further found that the claimant Wilson was operating a police car covered by the aforesaid insurance policy. While in the performance of his duties, and while standing in the vicinity of his parked vehicle was struck and severely injured by a hit-and-run automobile.

On March 12, 1988 the plaintiff and defendant entered into arbitration under the provisions of the uninsured motorist policy pursuant to Connecticut General Statutes §38-175c and the regulations of the Insurance Commissioner of the State of Connecticut.

The Town of Woodbridge maintained a

police department. Six of the aforesaid separately insured vehicles were vehicles provided to the police department and consisted of vehicles used as cruisers by the police department. James Wilson had used all six vehicles.

At the arbitration hearing the parties stipulated that: (1) the total value of Wilson's claim is $350,000; that the sum of $74,033.39 has been paid to him or on his behalf, in workers' compensation benefits; and that stacking of coverage, it applicable, is limited to six (6) police cars, a total of $240,000.

On July 25, 1988, a majority of the arbitrators rendered a decision and issued its final award having made the following findings:

1. The work "You" in Section D.1 of the uninsured motorists endorsement includes James Wilson within the meaning of "Town of Woodbridge, et al"; and he is a Named Insured under the policy.

2. On the facts of this accident, James Wilson is entitled to recovery under the provisions of the uninsured motorists coverage.
3. Since the six police vehicles are listed on the insurance policy, and separate premiums charged for each, stacking of the insurance coverage is proper.
4. The maximum limit payable under the policy, in view of the stipulation of the parties that it is limited to six cars, is $240,000.00.
5. Under Section E.@.a of the uninsured motorists' coverage respondent is entitled to a reduction of its $240,000.00 limits of liability by the sums paid or payable under workers' compensation, which have been stipulated to be $74,033.39.
6. The value of the Wilson claim is stipulated to be $350,000.00 and is in excess of the limits of coverage available.

Two of the arbitrators agreed to award the plaintiff Wilson $165,966.61, without interest or $240,000.00 - $74,033.39). One arbitrator dissents in a separate opinion.

On August 18, 1988, Security filed an application to vacate the arbitration award asking the court to vacate the ma-

jority award and that the proceeding be remanded to the arbitrators with direction to enter an order in conformity with the dissenting award.

On August 22, 1988, the plaintiff Wilson filed an application to correct arbitration award, on the basis that the arbitrators erred as a matter of law.

No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion. Connecticut General Statutes §52-420 (rev. to 1987); Kilby v. St. Paul Ins. Co., 29 Conn. sup. 66§ 6G W§070).

On July 30, 1988, the parties were notified of the award. On August 22, 1988, the plaintiff Wilson filed an application to correct arbitration award. On August 18, 1988, the defendant filed an application to vacate the arbitration award.

The motions to correct and to vacate, were timely filed by the parties.

Ordinarily "[A]rbitration is a creature of contract and the parties themselves, by the agreement of submission, define the powers of arbitrator." Quinn Associates, Inc. v. Borkowski 41 Conn. Sup. 17, 20 (1988). In cases where an award is challenged under Connecticut General Statutes §52-418(a)(4), as exceeding the scope of submission, the scope of judicial review is properly limited to a comparison of the award and the agreement of submission. Caldor, Inc. v. Thornton, 191 Conn. 336, 341 (1983). Furthermore, where the submission is deemed unrestricted, the award cannot be reviewed for errors of fact or law. See Carroll v. Aetna Casualty & Surety Co., 189 Conn. 16, 23 (1983). The instant proceeding however does not present ordinary, con-

tractual arbitration and the scope of judicial review is different.

The insurer in this action was compelled, by statute, to submit all issues to binding arbitration, including the issue of "stacking" fleet coverage. See Connecticut General Statutes §38-175c; Wilson v. Security Ins. Group, 199 Conn. 618, 622-24 (1986); Olivia v. Aetna Casualty & Surety Co., 181 Conn. 37, 41 (1980). The present arbitration was compulsory, not voluntary. "Where judicial review of compulsory arbitration proceedings required by §38-175c(a)1 is undertaken under Connecticut General Statutes §52-418, the reviewing court must conduct a de novo review of the interpretation and application of the law by the arbitrators. The court is not bound by the limitations contractually placed on the extent of its review as in voluntary arbi-

tration proceedings." American Universal Ins. Co. v. DelGreco, 205 Conn. 178, 191

.....omission.....

[Pages 6 to 9 containing decision on companion applications to correct filed by Wilson omitted as not relevant to federal issues] [Page 10]:

II

Motion to Vacate

Connecticut General Statutes §42-418 provides that the court shall vacate the arbitrator's award if it finds one of the four defects:

> (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of an arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

The movant, Security, claims that the majority erred as a matter of law in concluding that under the provision of the policy in question: (1) James Wilson is a named insured and (2) the stacking of coverage is proper.

A. Named Insured

The movant relying upon Testone v. Allstate Insurance Co., 165 Conn. 126 (1973), argues that Wilson is not a named insured in the policy. In Testone, the Supreme Court reversed the trial court's conclusion that the plaintiff was either a named or designated insured under the policy. There, the only named insured of the policy was the employer Joe's Service Station, Inc. There were no other designated insureds. The court in Testone reasoned as follows:

> "The mere fact that the plaintiff was acting within the scope of his

> employment at the time he was injured, while affording him remedies and rights under Workmens' Compensation Act does not transform him into a named insured or designated insured as defined under the uninsured motorist coverage of his employer's insurance policy.

Testone, at 130.

The policy in this action differs from the policy in Testone. The policy in question reads in pertinent part:

In Part I:

> "The following words and phrases have special meaning throughout this policy and appear in **boldface type** when used:
> A. **"You"** and **"your"** mean the person or organization shown as the named insured in ITEM ONE of the declarations.
> B. **"We"**, **"us"** and **"our"** mean the company providing the insurance...
> F. **"Insured"** means any person or organization qualifying as an insured in the WHO IS INSURED section of the applicable insurance. Except with respect to our limit of liability, the insurance afforded applies separately to each insured who is seeking coverage or against whom a claim is made or suit is brought.

In Part V:

"D. WHO IS INSURED.

1. You are an insured for any covered auto.

2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow except:

a. The owner of a covered auto you hire or borrow from one of your employees or a member of his or her household.

b. Someone using a covered auto while he or she is working in a business of selling, servicing, repairing or parking autos unless that business is yours.

c. Anyone other than your employees, a leasee or borrower or any of their employees, while moving property to or from a covered auto.

3. Anyone liable for the conduct of an insured described above is an insured but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an insured only if that auto is a trailer connected to a covered auto you own."

An endorsement included in the policy states:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

EMPLOYEES AS INSUREDS

The following is added to WHO IS INSURED.

Any Includes in definition or employee Member of the Commission on Aging & Volunteers of that Commission employee of yours is an insured while using a covered auto you don't own, hire or borrow which is used in your business or your personal affairs.

The policy discloses that employees are designated as insureds. Wilson as an employee was a designated insured under the policy.

There is no "named insured section" of the policy. The sections of the policy actually referred to in the policy definitions are contained in the "Declarations" Section. The terms "you" in the policy definitions require examination of what is shown in portions of the policy identified as the Declarations. None of the endorsements purport to amend or change what is "shown" in the Declarations. The words "the Town of Woodbridge, et al" are "shown" in the Declarations.

The other endorsements are relevant to

show reasonable expectation of the parties. The arbitrator finding that Wilson was an employee of the Town of Woodbridge under the Declarations is reasonable. The endorsement did not limit the Declaration but only included others.

The arbitrators found in the broadly stated language of the policy under the facts of the accident that Wilson was entitled to coverage.

The Security Insurance Company admitted in oral argument that Wilson had submitted evidence to the arbitrators that Wilson was in the process of taking a woman he had placed under arrest to place her in a covered vehicle to prepare his report.

The Security Insurance Company object to Wilson's offer of proof of the uncontroverted evidence before this arbitrators that Wilson was loading a covered vehicle.

The Security Insurance Company offered no record to this court that the findings of the arbitrators was not supported by the evidence.

The Security Insurance Company by its objection to the offer of proof by Wilson confined the proceedings before this court on the record yet offered no proof by the record before the arbitrators to reject their findings.

The Security Insurance Company sought judicial review of the proceedings before the arbitrators.

The plaintiff cannot cause injury to an insured who presented undisputed uncontrovertable proof that under the facts of the case existing required coverage under the statutes and regulations.

The arbitrators found under the facts the insured was entitled to coverage.

The plaintiff has the burden of proof

to show that it was injured. By the record presented the plaintiff has failed to demonstrate such burden. The plaintiff did not prove that the arbitrators found that Wilson was not loading or not using a covered vehicle.

B. Stacking

The Security Insurance Company contends that the majority of the arbitrators erred as a matter of law in concluding that Wilson was entitled to stack coverage of six vehicles insured under this fleet policy to obtain a maximum limit of $240,000.00.

Connecticut courts have consistently allowed the stacking of insurance coverage. See e.g., Allstate Ins. Co., v. Ferrante, 201 Conn. 478, 482 (1986); Dixon v. Empire Mutual Ins. Co., 189 Conn. 449 (1983); Nationwide Ins. Co. v. Gode, 187 Conn 386, 396-97 (1982); Safeco

Ins. Co. v. Vetre, 174 Conn 329, 330 (1974); Veal v. Aetna Casualty & Surety Co., 39 Conn. Sup. 90, 94-95 (Super. Ct. 1983).

Accordingly motion to vacate is denied.

Frank S. Meadow, Judge

IN ARBITRATION
FINDING AND AWARD
Dated July 25, 1988

On January 1, 1982, respondent had in force a insurance auto policy no. BA 85-21-50 (SAR), covering 31 vehicles owned by the Town of Woodbridge. The policy was issued to "The Town of Woodbridge, et al," and contained endorsement CA 2 x 17, providing uninsured motorists coverage with stated limits of $40,000.00

On said date, claimant Wilson was a Woodbridge police officer, operating a police car covered by the aforesaid insurance policy. While in the performance of his duties, and while standing in the vicinity of his parked vehicle, he was struck and severely injured by a hit-and-run-automobile.

The parties have stipulated that the total value of Wilson's claim is $350,000.00; that the sum of $74,033.39

has been paid to him, or on his behalf, in worker's compensation benefits; and that stacking of coverage, if applicable, is limited to six (6) police cars, a total of $240,000.

By majority vote, the arbitrators make the following findings:

1. The word "You" in Section D.1 of the uninsured motorists endorsement includes James Wilson within the meaning of "Town of Woodbridge, et al"; and he is a Named Insured under the policy.
2. On the facts of this accident, James Wilson is entitled to recovery under the provisions of the uninsured motorists coverage.
3. Since the six police vehicles are listed on the insurance policy, and separate premiums charged for each, stacking of the insurance coverage is proper.

4. The maximum limit payable under the policy, in view of the stipulation of the parties that it is limited to six cars, is $240,000.

5. Under Section E.2.a. of the uninsured motorists' coverage, respondent is entitled to a reduction of its $240,000 limits of liability by the sums paid or payable under workers compensation, which have been stipulated to be $74,033.39.

6. The value of the Wilson claim is stipulated to be $350,000 and is in excess of the limits of coverage available.

AWARD

In view of the foregoing, the respondent is directed to pay to claimant the sum of $165,966.61, without interest.

Arbitrator John Lemega dissents in a separate opinion.

s/Richard Bieder
George E. McGoldrick

ARBITRATION
DISSENT
Dated July 22, 1988

In its award in favor of the claimant, the majority of this panel concluded that, at the time of the hit-and-run accident which resulted in the claimant's concededly serious injuries, the claimant was a "named insured" under the business auto policy which the respondent had issued to the claimant's employer, the Town of Woodbridge. I would respectfully suggest that this conclusion is clearly and patently in error.

The operative facts of this case are relatively straightforward. In the early morning hours of January 1, 1982, the claimant, James E. Wilson, then in the course of his employment as a Woodbridge police officer, was struck by a hit-and-run motorist and sustained serious bodily injury. At the time of the accident,

Wilson was in the process of taking into custody and/or interrogating a young woman whom he and his partner had apprehended. Although he had driven a Woodbridge police cruiser to the scene of the accident, when he was struck he was not occupying the vehicle and was, in fact, a pedestrian.

At the time of the accident, the police vehicle, which he had driven to the scene and from which he had exited prior to being struck, was amount some 29 vehicles which were insured under a business auto policy which the respondent had issued to the Town of Woodbridge. That policy identified as named insured the following entities: TOWN OF WOODBRIDGE and each of its duly constituted boards and commissions, THE BOARD OF EDUCATION, and THE WOODBRIDGE FIRE ASSOCIATION, INC."

That insurance policy also provided

uninsured motorist coverage. That coverage obligated the respondent to "pay all sums the insured is legally entitled to recover as damages from the owner or driver of an uninsured motor vehicle." In defining "Who Is Insured" under this coverage, the policy provided:

> D. WHO IS INSURED
> 1. You or any family member.
> 2. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.
> 3. Anyone for damages he is entitled to recover because of bodily injury sustained by another insured.

The policy defines "you" to mean "the person or organization shown as the named insured in Item One of the declarations." It further defines "family member" to mean "a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child."

Against the background of these policy provisions, the majority of this panel apparently construed the phrase"you or nay family member" as ambiguous in light of the fact that the policy identified as named insureds ("you") certain municipal and corporate entities. Because the phrase "you or any family member" would appear to be out of place in a business auto policy, the majority seeks to resolve this so-called "ambiguity" against the respondent and in favor of the extension of coverage to the claimant.

The threshold problem with this conclusion is that it files directly in the face of the Supreme Court's decision in Testone v. Allstate Ins. Co., 165 Conn. 126 (1973). In Testone, the plaintiff had driven a wrecker owned by his employer, Joe's Service Station, Inc. to the site of an accident. While out of

that vehicle and working on another vehicle which had been involved in that prior accident, the plaintiff was struck by an uninsured motorist. The plaintiff then asserted an uninsured motorist claim under the policy covering the wrecker. THat policy provided for uninsured motorist coverage to "(a) the named insured and any designated insured and while residents of the same household, the spouse and relative of either; (b) any other person while occupying an insured highway vehicle." Id. at 129. The trial court concluded that because at the time of the accident the plaintiff was an employee of Joe's Service Station, Inc. and had been using the wrecker within the scope of his employment, he was either a named insured or a designated insured under the policy.

The Supreme Court rejected the trial court's conclusion and stated:

> The mere fact that the plaintiff was acting within the scope of his employment at the time he was injured, while affording him remedies and rights under the Workmen's Compensation Act, does not transform him into a named insured or a designated insured as defined under the uninsured motorist coverage of his employer's insurance policy.

Id. at 130. It seems to me that both factually and legally the Testone decision should control the instant case and I am at a loss to understand how the majority of this panel can so blithely ignore such established legal precedent.

Indeed, in apparently seeking to characterize the phrase "you or any family member" as ambiguous because it appears in a business auto policy which lists only municipal and corporate entities as the "named insureds," the majority has in fact sought to reform the policy. That there are no members of the class of insureds described as "you or any family member" in the context of this business

auto policy does not transform this phrase into an ambiguity. The words are explicit and the meaning is clear. The phrase simply becomes a nullity. Sears v. Wilson, 704 P.2d 389, 392 (Kan. Ct. App. 1985).

Nor is the Connecticut Supreme Court alone in eschewing the importation of an artificial ambiguity into this policy language. Courts in other jurisdictions are essentially unanimous in agreeing with the Testone construction of this policy language. see Buckner v. MVAIC, 486 N.E.2d 810, 811 (N.Y. 1985); Sears v. Wilson, supra at 390; Pearcy v. Travelers Indemnity Co., 429 So.2d 1298 (Fla. Dis. App.), rev. den. 438 So.2d 833 (Fla. 1983); Dixon v. Gunter, 636 S.W.2d 437, 441 (Tenn. App. 1982); General Insurance v. Icelandic Builders, 604 P.2d 966 (Wash. App. 1979) there is simply no le-

gal basis by which the majority can justify its transmogrification of the claimant into a "named insured" under the respondent's policy. Guarantee Ins. Co. v. Anderson, 585 F.Sup. 408, 411 (E.D. Pa. 1984).

The claimant is not entitled to uninsured motorist coverage under the respondent's policy. Accordingly, I dissent.

s/John W. Lemega, Arbitrator

APPLICATION TO VACATE ARBITRATION AWARD

To the Superior Court, within and for the Judicial District of New Haven, now in session, comes Security Insurance Group, a/k/a Orion Group, Inc., the Plaintiff seeking an order vacating a certain Arbitration Award involving matters between the Defendant James Wilson and the Plaintiff Security Insurance Group, a/k/a Orion Group, Inc., and complains and says:

1.Pursuant to C.G.S. §38-175c, Policy No. BA 852150 (SAR) and its Amendatory Endorsements, the Plaintiff and the Defendant submitted to arbitration their dispute regarding the uninsured motorist insurance issued to the Defendant's employer, Town of Woodbridge by the Plaintiff. A copy of the declaration, policy and endorsements are attached as Exhibit A.

2.On July 25, 1988, two of the three arbitrators made written award, which the Plaintiff received on August 1, 1988. A copy of that award is attached as Exhibit B.

3.On July 22, 1988, arbitrator John W. Lemega dissented from the majority award. That dissent was included with the award and received by the Plaintiff on August 1, 1988. A copy of the dissent is attached as Exhibit C.

4.Plaintiff Security Insurance Group, a/k/a Orion Group moves the Court to vacate the majority award for the reason that said award was based on an erroneous interpretation of Connecticut law and therefore exceeded the arbitrators' powers.

WHEREFORE, the Plaintiff prays:

1.That the majority award be vacated and that the proceeding be remanded to the arbitrators with direction to enter an order in conformity with the dissenting award.

2.That the Defendant be ordered to appear on a day certain to show cause, if

any it has, why this Application should not be granted.

Dated at Hartford, Connecticut, this 18th day of August, 1988.

PLAINTIFF, SECURITY INSURANCE GROUP
a/k/a ORION GROUP, INC.

By_____

Susan M. Cormier
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, CT. 06105

STATE OF CONNECTICUT
SUPREME COURT
NO. 13618

SECURITY INSURANCE COMPANY
V.
JAMES WILSON
February 21, 1990

O R D E R

THE MOTION OF THE DEFENDANT, FILED FEBRUARY 8, 1990, FOR REARGUMENT AND RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT,

IT IS HEREBY ORDERED DENIED.

BY THE COURT

/s/ Michele T. Angers

FIRST ASSISTANT CLERK-
APPELLATE

Exerpts from Wilson Brief to Connecticut Supreme Court.
[From page 4]:

Security's theory of the case on its Motion To Vacate was that no proof of evidence before the arbitrators was relevant and no other proof was admissible.

Security elected to proceed without proof of the record before the arbitrators apart from the exhibits attached to its Motion to Vacate. Transcript 9,14,-15,20,22,27. Appendix pp1-5.

At trial, Wilson claimed there was evidence before the arbitrators that Wilson was a user of the vehicle, and was loading it, supporting their second finding. Objections to Wilson's offer to submit proof of such evidence were sustained. Transcript pp 9,20,30,35,82. Appendix pp 1-5. Exceptions taken, Tr. pp 56,57. Constitutional grounds were asserted under the due process clauses of the 5th

and 14th Amendments to the Constitution of the United States, and under the provision of Section 10 of the Constitution of Connecticut.

In its memorandum of decision, the trial court decided coverage issues raised by the Security on the Motion to Vacate, assuming the facts claimed by Wilson appeared in the record before the panel absent tender of proof to the contrary from Security, which had the burden of proof on the Motion To Vacate.

.....

[Wilson Brief, pg 22 et seq]:

PART IV

THE SECURITY FAILED TO MEET ITS BURDEN OF PROOF IN THE TRIAL COURT.

The legislature has placed the jurisdiction to hear and decide coverage issues in the arbitrators. The function of the court is to provide review, and not to

undertake "trial" de novo. The scope of "de novo review" is first discussed in Holley v. Sunderland, 110 Conn. 80, at 83. The test of all administrative decisions in the courts is by the standard of "de novo review".

Reviewing court may review the record where challenge is made to the inadequacy of the statements of the tribunal; the decision of an arbitration panel ought not be overturned if the decision below is reasonably supported by the evidence heard by the arbitrators. Stankiewicz v. Zoning Board of Appeals, 211 Conn. 76. This applies to both grounds of Security's appeal.

It is not the function of this court to retry the case. The bounds of judicial review are limited. Burnham v Planning & Zoning, 189 Conn. 261, at 266 (bottom)

The burden is on the person moving to

vacate. 5 Am. Jur 2d 657, Arb. & Awards §186, fn 7. Overseas Private Investment Corp. v Anaconda Co., (D.C. Dist. Col.) 418 F.Supp. 107.

It is presumed that all issues submitted to the arbitrator for decision have been passed upon and resolved and the burden of proving otherwise is upon the party challenging the awards. Rodriques v Keller, 113 Cal. App. 3rd 838., 170 Cal. Rptr. 349. (Cited: Wilson v Security Ins. Co., 199 Conn. 618, 630).

Similarly, when a jury verdict has been rendered for the defendant, the presumption is that all issues were found for defendant. Kosko v Kohler, 176 Conn. 383, 385.

Where two or more distinct defenses exist, a general verdict will be sustained if it can be supported on the basis of one of them. Kosko v Kohler, 176 Conn. 383, 385.

A general verdict for a party must stand where one of two or three grounds support a general verdict. Franks v Lockwood, 146 Conn. 273 at 279.

The standard to be applied when reviewing a compulsory arbitration award which is alleged to be infected by error of law is whether any rational basis exists for the determination. (Compulsory arbitration award upheld, where decision questionable but not so irrational as to require vacatur.). Shand v Aetna Ins. Co. (1980) 74 A.D. 2d 442, 428 NYS 2d 462. (Decision subsequent to Mount St. Mary Hospital v Catherwood, 26 NY 2d 493, 260 N.E. 2d 508 which decision was cited in Wilson v Security, 199 Conn. 618 at 629).

The standard adopted in Detroit Auto, Inter-Ins. Exchange v Gavin, 331 N.W.2d 418 (Mich. 1982) (Cited: Wilson v Secu-

rity, 199 Conn. at p. 629) is to the same effect. The formulation adopted would require the reviewing court to find that "but for" an error a substantially different award must have been made. 331 N.W.2d at 434, top. Any award having a basis in two separate and distinct theories must stand if an error appears only as to one claim.

Every reasonable intendment is indulged to give effect to the award. 5 Am. Jur. 2d 656, Arb. & Award §185, fn 14 Citing: Straus v North Hollywood Hospital, 150 Cal. App. 2d 306, 309 P. 2d 541; VonLangendorff v Riordan, 147 Conn. 524; Cusano v Dunn, 137 Conn. 20, 24; Strain v. Mims, 123 Conn. 275, 285.

There are no presumptions known to the law that assist the Security which has the burden of proof.

The burden of proof is affected by the

fact that a policy of insurance is a contract of adhesion. Aetna Casualty & Surety Co. v. Murphy, 206 Conn. 409, 415, bottom. Questions of fact are at issue. Contracts, by John D. Calamari & Joseph M. Perillo (Hornbook Series) 1977. at pg 337, Fairfield Lease Corporation v Romano's Auto Service, 4 Conn. App. 495 at 498-499. As a contract of adhesion existed, it is relevant that the provisions of the Uninsured Motorist Coverage had been construed by the courts of Connecticut and stacking had been allowed, that Security had selected a form compatible for use with a family automobile policy, that Security as the party seeking to enforce a construction contrary to the prior decisions of this court. It had the burden of showing that the provisions were explained to the other party to the contract, and came to his knowledge and

that there was in fact a real meeting of the minds and not merely an objective meeting. Contracts, by John D. Calamari & Joseph M. Perillo (Hornbook Series) 1977. at pg 337. Since the intent and effect of §38-175c (a) (1) was "to remove from the court and to transfer to the arbitration panel the function of determining, in the first instance, all issues as to coverage under automobile liability insurance policies containing uninsured motorist clauses providing for arbitration" (Lane v. Aetna Cas. & Surety Co., 203 Conn. 258 at 263) the Security abandoned its position by failing to offer proof of the proceedings before the arbitration panel.

Absent proof that the parties actually understood that a result contrary to Ferrante was intended, the arbitrators were entitled to apply the law of Ferrante to the contract so similarly constructed.

Since the the first conclusion of Arbitration panel was the "et al" provision was broad enough to cover Wilson, the state of the facts before the panel was relevant upon review. No meeting of the minds to the contrary is claimed to have been proven by Security. Rights of employees had clearly been the subject matter of coverage in the negotiations for coverage, otherwise the endorsements would not appear.

Security did not prove the second paragraph of the findings of the Arbitrators commencing "On the facts of this accident .." was not supported by the record before the arbitrators. This justifies the conclusion that the evidence was sufficient at their hearing to justify their conclusion. Security did not prove that the arbitrators found Wilson was not loading.

Since Wilson's useage of the vehicle qualified him for liability coverage, the evidence concerning that useage was relevant to the propriety of the decision of the arbitrators.

If he had liability coverage, he was insured for uninsured motorist coverage.

Since the presumptions are that the arbitrators' decision was proper, the burden to show on the facts that the decision could not be reached was upon the Security. Security fails because it did not show the record upon which the decision was reached.

The purpose of the decision in Wilson v Security 199 Conn. 618 is to protect constitutional rights of parties in compulsory arbitration from injury done to a party in his property. Wilson, 199 Conn. at 628. Protection from arbitrators who disregard the law was sought by Security

in its 1985 appeal. Fair procedures for review were sought. The Supreme Court agreed - see American Universal v DelGreco, 205 Conn. 178, at 189. At the time the Security Insurance Company came into this court, took a position at trial that Wilson had no right to show the true state of facts before the arbitrators. By its objections in Superior Court, Security has voluntarily caused the review proceedings to be confined to a record consisting only of the Insurance Company's petition, its policy and the decision. The Security submitted no proof of the proceedings before the arbitrators. The Security seeking to have the majority opinion construed in the light of the dissenting arbitrator's limited statement by innuendo.

We quote from American Universal Ins.Co. v DelGreco at 191:

"Thus a standard of judicial review of compulsory arbitration on proceedings which is limited to the record and under which the reviewing court may determine only whether the award conforms to the submission, would in most cases be the equivalent of no review at all and would be constitutionally suspect. Something more is required.

The Security cannot constitutionally prevail upon the record it presents for review. Something more was required.

The Security had the right to join issue on the content of the the evidence before the arbitrators even if no transcript existed. The Morama Corporation v. Town Council of West Hartford, 146 Conn. 588; Tarasovic v. Zoning Commission, 147 Conn. 65 at 69.

Having sought and having succeeded in obtaining a right to judicial review of

the proceedings before the arbitrators, the insurance company must respect the constitutional rights of Wilson and so must the court.

Wilson asserts his Constitutional rights as set forth in American Universal v DelGreco, 205 Conn. at 189:

1.) Not to be deprived of property and liberty of contract without due process of law under State and Federal constitution; 2.) A right to jury trial and/or the State's constitutional access to the courts provisions; 3. A right to challenge unconstitutional delegations of legislative or judicial power in violation of the State's separation of powers provisions.

The party who seeks equity must grant equity. The Security sought equitable right to judicial review which was not limited to a bare record and sought pro-

tection from injury when it previously brought its claims to the Supreme Court.

The Security insurance company cannot cause injury to an insured who presented undisputed, uncontrovertable proof that the state of facts existing required coverage under the mandate of the statutes and regulations and who received the award of arbitrators who found that under the facts presented the insured was entitled to coverage, by creating artificial standards for review which eliminate Wilson's right to deny Security's unproven claims of injury. Upon the record the insurance company has presented, it would be an unfair, unjust, unconstitutional result if Security were to prevail.

The Security by proceeding to arbitration without a stenographer waived the right to a stenographer.

The Security cannot attempt to switch the burden of proof to Wilson and simultaneously object to offers of proof which show the award was required in fact and in law. Security has the burden of proving its claims of injury. If the uncontroverted facts before the arbitrators did not demand recovery by Wilson, it was their burden to prove an injury.

The Security cannot cause injury to Wilson by invoking procedures that would assume injury occurred to Security in the absence of proof.

Before the decision in Wilson v Security Insurance, 199 Conn. 618, the award of the arbitrators was final and binding. See American Motorists Ins. v. Brookman, 1 Conn. App. 219, 470 A2d 253.

The legislature provided that the jurisdiction for hearing and deciding the coverage issues would be placed with arbitra-

tors if the insurance carrier voluntarily elected to include an arbitration clause in its policy to provide for resolution of other disputes concerning Uninsured Motorist Coverage. This insurance company did not see fit to prescribe the scope of judicial review of any issue submitted to arbitrators. It did not by contract prescribe the procedures which were to be followed in seeking judicial review. The policy written does not impose any burden upon the insured in the judicial review process when the insurance company moves to vacate an unfavorable award. Since the policy must be construed against the company and the terms of the policy place no burden upon Wilson in this process and the policy does not require the arbitrators to state all of their findings and does not require them to detail and make specific

each finding of fact, the Security's claims must fail.

The Security did not prove injury in the constitutional sense because the Security did not prove that on the evidence heard by arbitrators their decision was unreasonable or against the law. The Security did not prove that the arbitrators found that Wilson was not loading or not using. Indeed, had they so found, such a decision would have been legally unreasonable as against the uncontrovertable evidence heard by them. The duty to prove injury placed a greater burden upon the petitioner.

.....

[Exerpts from transcript of proceedings in Superior Court before Meadow, J. [Tr. 9]

MR. REILLY: Page twenty-eight has the scope of the review and I find it necessary to go into much greater detail for the reason that the arbitrators, I believe, sustained two grounds which we claim were --- for the establishment of liability on the part of the insured's company. Ground one was the definition of the declarations as to who was the insured. They define the words insured as the Town of Woodbridge, et al which means and others. A second ground was we were claiming under the facts that existed in this case my client was entitled to be covered as a matter of law because of the scope of the regulations [Tr. 10] and statutes of the State of Connecticut. My client is a police officer. He had a lady who was in handcuffs under arrest

and he was in the process of loading this lady into the automobile as loading is defined. I don't think we normally talk about loading people but when you place things in and out of automobiles and you use an automobile for that purpose it's normally required coverage. Finding number two of the arbitrators says that under the facts of this case Mr. Wilson was entitled to recover. The petition that is filed does not address the facts that was presented to the arbitrators. Our -- were wholly uncontested. There was a lady. She was in handcuffs. The police report was in evidence. the man who was with Mr. Wilson gave testimony before the arbitrators that they were talking this lady to Mr. Wilson's police car when there was an interruption by an outsider. Mr. Wilson was compelled to deal temporarily to deal with the interruption. But

the purpose of getting this lady into the vehicle and placing her into the vehicle is a loading aspect. Now under the regulations of the insurance commissioner Section 5 of the regulations specifically states that employees of the named insured must always be insured for loading operations under all circumstances [Tr. 11] for liability coverage. Now liability coverage and insurance for liability coverage becomes important because of the structure of the statutes and the statutes says, section 38, 175C.

MS. CORMIER: Excuse me, Your Honor. I think now he's getting into the merits of-- I think what we decided first would be appropriate review was whether the court could hear testimony now from people that obviously- the fact that they're testifying now means that-

THE COURT: I know. It seems to me that the certainly your issue is whether or not there was coverage.

MS. CORMIER: My is whether there was-

THE COURT: And you want me to interpret the application of an insurance policy.

MS. CORMIER: Based upon the findings made by the arbitrators in the decision. I don't think you have to go outside the record for that.

THE COURT: You don't think so?

MS. CORMIER: No I don't.

....

[Tr. 14]

MS. CORMIER: Your Honor, what I propose is very simple. I think that what Your Honor has in front of you is the record that I need for you to review the issues of law and that is the insurance policy which the arbitrators found in their find-

ings and award was the policy between the two parties. And then you have the finding award in the descent. The finding and the finding award contains the facts that they found plus stipulations by the parties. And that is sufficient record for Your Honor. That presents the factual background-

.....

[Tr. 15]

MS. CORMIER: Oh, Yes, Your Honor, and that's exactly what I'm asking you to review. What I'm trying to do is make a distinction between the findings of fact. What I'm saying is just because there was evidence before the arbitrators doesn't mean that the found something. ....

[Tr. 16] MS. CORMIER: Well, Your Honor, I think he is if he's- one thing he's trying to put before you- What he's

saying is that look it. There was evidence before the arbitrators that this happened and that happened and the fact that they may have been at this point. That's irrelevant. If the arbitrators didn't make findings of fact regarding the evidence you can't buy from the evidence to support and interpretation of the law. Because in essence you would be finding facts. You would be saying yes, I agree with Mr. Reilly's interpretation of the evidence before the arbitrators and, therefore, I support their interpretation because I find that their interpretation [Tr. 17] is based upon this evidence. But what I'm saying is that that goes beyond what your function can be at this level.

....

MS. CORMIER: Your Honor, I think that what he says in that brief is the-

THE COURT: The burden is on the person moving to vacate. All issues submitted for decision have been passed upon and resolved and the burden of proving otherwise is upon the party challenging the award. It seems here that he says that the presumption of all issues were to found for the Defendant.

MS. CORMIER: Your honor, -- I don't think there's any such presumption.

....

[Tr. 20] MR. REILLY: My claim is that all the facts that were disputed, are found in favor of Mr. Wilson, and they are not limited in what they say-- they do not say "on the facts of this accident, as we have recited them previously"-- they are talking about all the facts, that were before them. All the undisputed facts that were before them. Your Honor, the finding ought to be

tested in view of the claims of proof. Years ago we use to take appeals to the Supreme Court and we would test the jury verdict to see whether or not there was evidence before the jury verdict which is general, as to whether or not there were claims of proof to support the jury verdict.

The following concession as to the record before the arbitrators appears:

[Tr. 22] MS. CORMIER: I think that it was made explicit by the findings they made in the response by decent. My position would be that the issue was submitted to the arbitrators, there were two ways in which the plaintiff claimed to be covered under the policy. One was that he was the named insured, and one that he was using the [Tr. 23] vehicle-there were

no findings regarding his using the vehicle--the arbitrators made a specific finding that he was covered as a named insured. ....

[Tr. 27] MS. CORMIER: Your Honor, I don't think you can change their finding of fact as opposed to their conclusions of law. To say that there is coverage is a conclusion of law. What I think you can't do is to change their finding of fact which I think, altho Mr. Reilly says he agrees that there is no denovo (phonetic) trial and stuff, what he would like to do is put before all kinds of evidence before you and he said it was all undisputed and that's not true. What he's [Tr. 28] trying to say is that look at it, there was all this evidence--
THE COURT: The burden is on you, the burden is on you to present to this court

the basis for this court to vacate that decision.

MS. CORMIER: Your honor, I agree, what I am saying is that --

THE COURT: let's start there-- you have submitted to me, the application, the insurance policy, which was up there, and the two decision, the majority decision and the descenting decision--and you told the Court you rested on that.

MS. CORMIER: Yes your Honor, because in their findings of fact, if they haven't, if there is nothing before you that- if all they said was--

THE COURT: If that's what you present, that's what you present, that's the end of it. ....

[Tr. 30] MR. REILLY: .... Now I claim that there is a presumption-- that the arbitrators made all the findings necessary to support this conclusion. That on

the facts of this accident Mr. Wilson was entitled to coverage and there is no presumption that they didn't do something that is necessary to that conclusion. And there is no presumption that the facts they happen t refer to, are the only facts that they found. They didn't say that. It would be grossly unfair to have a situation presented to this Court, where it is totally undisputed before the arbitrators as to what the full scope of the facts were and because of the way in which they drafted language--and they come to the statement that on the facts of this accident, Mr. Wilson is entitled to recovery. The facts now going to be restricted in some fashion, there is no statement in that finding--that what they saying is to be restricted by what they said early. That would be grossly unfair to Mr. Wilson. The facts are undisputed that he was loading.

....

[Tr. 35] ...MR. REILLY: The argument I have already given you your Honor, is that there is no finding that Mr. was not loading. ....

MR. REILLY: I would like to put Mr. Wilson on--I have all the exhibits where were before the arbitrators. May I have Mr. Wilson put on the stand to testify that our claims prove they heard it all. They heard it all.

THE COURT: I am not going to re-hear. You're asking me to re-hear. They decided in your favor. She wants me to take it away. I am not going to re-hear what you have these people. I a may not be as explanatory based upon the facts, but I may arrive at the same conclusions. I am going to read the evidence.

MR. REILLY: That would be my claims of proof.

THE COURT: You already gave me your claims of proof, you gave me a brief. You also said that it is presumed that they took that into consideration. And [Tr. p. 36] you also submit that I shouldn't re-try the case. I am not going to re-try it.

Regarding claims as to the cost of coverage, Wilson made the following claim at trial:

[Tr. 47] MR. REILLY: Your Honor, I have this to say about it. The argument is pure speculation and it is not based on facts proven to the arbitrators. She talks about the cost of premiums for insurance. Insurance is something that is sold to millions and millions of customers. And they spread the risk. And the object is to make it so [Tr. 48] cheap that everybody wants to buy it.

Because you can take something that is unreasonably expensive such as a million dollars like she--and sell it for a reasonable premium. What's wrong with that? That's the whole object of selling insurance, sell it cheap, the cheaper the better-now everybody wants to buy it. Now they way this is so cheap it's too expensive, for them. But they don't put on any proof of that. ....

Exception to ruling on offer of proof appears at p. 56, 57.

[Tr. 82] MR. REILLY: ....This petition started out, it started first with their petition. They sought to vacate and they came into Court with a petition that doesn't state any grounds. My motion to dismiss on that has already been refused. I filed an application to request to admit,

that's been denied, there's no provision for it. So what the facts were, I can't get into evidence from a request to admit or by agreement. I want to put on Mr. Wilson to show, what the facts were before the arbitrators. I think I need it. I think I need it in the constitutional sense, I think I [Tr. 83] need it in due process sense under the fourteenth amendment, the fifth amendment, or the Constitution of the United States and I think I need it under the Constitution of Connecticut. Those are grounds for having those things in this case. Mr. Wilson is entitled to as much fair consideration as the insurance company is. They have established new law in this State, that allows both sides to have constitutional review. And if they are going to come into Court and seek constitutional review without a record, without a transcript, without a

showing to this Court as to what the arbitrators had before them, then their going to argue well, there's nothing in the record that says the arbitrators in this case, found something as to the loading, or didn't find something as to the loading, and they expect to prevail on that issue without my having an opportunity to be heard, my client's constitutional rights are being stepped on, and those are grounds that I would offer to the Court in support of my earlier exceptions. Those things have got to come in. ....

SUPREME COURT OF THE STATE OF CONNECTICUT
NO. 13618
SECURITY INSURANCE CO. V. JAMES WILSON
FEBRUARY 8, 1990

MOTION FOR REARGUMENT AND RECONSIDERATION

The defendant Wilson in the above matter moves for reargument and reconsideration for consideration of the issues as follows:

Did the decision violate James Wilson's rights under the Contract Clause and to due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sec. 10 of the Constitution of Connecticut by A) failing to decide issues presented on appeal, B) by failure to conduct review de novo based upon the full record of proceedings in arbitration over objection, C) by rendering decision without rational basis, and D) by assumption of the fact-finding powers of the arbitrators.

History. Dispute concerning Uninsured Motorist Coverage including coverage issues submitted to arbitration. Award to plaintiff. Motion to vacate filed by insurance carrier, which motion was followed by a Motion to Correct by insured. Trial before Judge Meadow. Insurance Company appealed, followed by Wilson's cross appeal in the action entitled "Security v. Wilson" (the issues thereon not discussed in the Opinion), and followed by Wilson's appeal from decision on Motion to Correct filed in the separate action "Wilson v. Security".

Facts Relied Upon.

a) The issues raised by the Cross Appeal in the action Security v. Wilson were not decided on the record. Wilson had moved to dismiss the Motion to Vacate on the grounds briefed in this court. The Motion to Vacate set forth no

grounds, for example: it did not identify a stacking issue. It was constitutionally defective. (Record p. 6) Motion to Dismiss was a timely objection without waiver.

b) The facts presented to the arbitrators are presumed to have supported their decision. The proceedings constituting judicial review were conducted in total disregard of the scope of the fact finding powers of the arbitrators conferred by the legislature. The issue was briefed and duly preserved for decision. No record of proceedings before the Arbitration was produced by the Insurance Company. No evidence was permitted to be offered by Wilson in the trial court as to the content of the proceedings in arbitration. Absent proper Motion to Vacate and absent proper proof essential to constitutional review, the issues decided

in the appeal from the decision in Security v. Wilson should never have been reached.

The decision finds as a fact that at a charge of $3.00 or $5.00 per vehicle for Underinsured Motorist coverage issued pursuant to regulations of the State of Connecticut would not produce a reasonable expectation by either party to the contract that stacking would result. Evidence of the true and real expectations of the parties is ruled to be inherently immaterial because the court never saw the record. Wilson claimed that this court cannot review fact-finding by arbitrators without proof of the proceedings in arbitration. These issues duly raised and fully briefed were totally omitted from the decision. The unproven inference drawn by the court's decision is that the premium charge would not bear

the projected risk or that the insurance company would sustain an unreasonable loss. If this were true, the insurance company would have the ability to produce proof to substantiate its claim. The place to produce proof is in arbitration. If the insurance company did not offer proof, the inference to be drawn is that such proof, if offered would not have been favorable. Secondino v. New Haven Gas Co., 147 Conn. 642. The record does not disclose that the arbitrators made an unreasonable finding based upon evidence before them, nor that any offers of sworn actuarial proof were rejected or disbelieved. The calculations used by the court do not reflect the amount of premium receipts, expenses, amount of reserves, nor profits [or loss] ratios. The Court had in this case only one policy. The Cohn policy was not shown to

have been in evidence at arbitration in the Wilson case. In the Cohn case, the court had before it, a single schedule of premiums. The court did not have any proof of the industry practices in either case. The court did not have before it any proof of the internal legal advise given to any insurance carrier as to the invalidity of "other insurance" clauses issued for the purpose of guiding the actuarial experts who set prices for premiums.

The basis for actuarial computations of anticipated profit or loss requires more than a look at the declarations page in a single policy. (See opinion of Shea, J. dissenting, Nationwide v. Gode, 187 Conn. 386 at 403.) Statisticians need to know the number of vehicles to be insured, the history of losses. It is common knowledge that premium costs as a

percentage of limits will decrease. The higher the limit, the lower the premium ratio. Without proof, without a record, there is no rational basis for concluding that coverage was excessive based upon the declarations sheet of any policy. The attempt to do so is ludicrous and lacks credibility.

From 1967 until the date of this decision, insurance companies knew that "Other Insurance" clauses were not authorized by the regulations. They were entitled to review the premium charges according to risk assumed. Reasonable expectations is a question of fact. This fact is determined by the Supreme Court based upon premium charges by a company that charges but does not prove, that premium it elected to charge was insufficient. The Supreme Court does not have this fact-finding authority. Styles v. Tyler, 64 Conn. 432.

After Pecker, from 1976 forward all insurance companies knew UM "other insurance" exclusions were illegal. All parties to every such contract were charged with knowledge of that decision.

No declaratory judgment action was ever brought in regard to the fleet coverage issue. No amendment to the regulations to allow "Other Insurance" clauses for business policies were adopted. It is now 1990 and insurance companies have collected premiums for uninsured motorist coverage throughout this period. No court or fact-finding commission has determined whether premiums charged have been adequate or inadequate for the risks assumed, with or without stacking for the purposes of the record in this case.

Had the insurance carrier shown that it offered evidence in the proceedings below from actuarial experts, sworn testimony

was or would have been subject to cross-examination and scrutiny. Evidence was or would have been available for fact-finding purposes. No record was produced for review. There was no proof that the insurance carrier had not pre-calculated and charged for the risk. There was no proof that the industry was not intending to charge for this risk. There was no proof of premium charges by other companies at any time in the period affected by the judgment.

The legislature has delegated the authority to regulate the insurance industry to the office of the Insurance Commissioner. At no time has this office promulgated a regulation that exempted automobile insurance policies sold to businesses from any regulation. No regulation was adopted which authorized "other insurance" clauses for a business

policy. The legislature has not enacted any law which would authorize the inclusion of an anti-stacking clause in any automobile policy.

The decision pre-assumes, without proof that insurance companies and businesses do not intend to contract for Uninsured Motorist Coverage with stacking, under Connecticut regulations, under the same policy terms as are found in family automobile policies. The decision departs from prior decisions which showed examination of the policy language and departs from prior cases which gave effect to the scheme of the statutory-regulatory language, and further, departs from the concept of review of the arbitration record. The court is wholly unaware of the existence or non-existence of other facts which would or could have reasonably affected the beliefs of the parties to the

contract. Review of the record before the arbitrators was prohibited.

The judiciary cannot sit as a super legislature. Blue Sky Bar, Inc. v. Stratford, 203 Conn. 14, 27. New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed. 2d 511.The insurance companies have been free to set their premiums based upon the expectation of stacking and simultaneously to issue propaganda without proof. This is contrary to Wilson's rights. There is invasion of the rights of the legislature.

> "If a statutory scheme is clearly comprehensible and can be applied, we will apply it although it may mandate a result which appears illogical. If the enactment be constitutional, its wisdom is not for this court to determine. Cyphers v. Allyn, 142 Conn. 669, 705, 118 A.2d 318 (1955); Brunswick Corporationv. Liquor Control Commission, 184 Conn. 75, at 81.

The invasion of legislative power is two-fold. Not only does the legislative

power to determine the desirability of fleet stacking rest with the General Assembly, and the Insurance Commissioner under the power delegated to the commissioner, but, the legislature placed primary jurisdiction to determine the issues of coverage in arbitration, when insurance companies included arbitration clauses. Thereupon the power to find facts and to take evidence was placed with arbitrators. This court, over objection, in the appeal taken by the insurance carrier heard in 1986, said (199 Conn. 618) that this insurance company had used a "restricted" arbitration clause, and that the court could review any decision later to be made in arbitration. The purpose was to assure due process of law and to guarantee that parties compelled to submit to arbitration would not be subject to binding arbitrary and

unreasonable awards not justified by evidence and the public policy as found in the statutes and regulations.

James Wilson has been deprived of his contract rights to have facts found by arbitrators and deprived of due process of law by the standard of review applied in this case. The effort to prevent binding arbitration awards viewed as arbitrary and unreasonable should not be directed toward a process of review which produces a decision that

> 1) is not based upon the evidence presented in arbitration nor rulings of the arbitrators resulting therefrom, and/or
> 2) is based upon a fact-finding proclamation not founded upon constitutional, legislative or regulatory declaration and without any adequate investigative or fact-finding process,

otherwise, the power to determine the controversy between the parties in unreasonable manner not intended by the legislature has been merely transferred, in

violation contract rights and of of the rights to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sec. 10 of the Constitution of Connecticut.

As a demonstration to illustrate the inadequate calculations set forth in the opinion, this lawyer knows of an instance where Lloyds of London sold liability coverage for One Dollar for coverage without limit applicable in a vehicular personal injury action settled for $50,000.00. The insurance company's total exposure was infinity. The premium charge was the usual and customary Tne court in its opinion has drawn an unfair and unreasonable conclusion based upon the agreement re damages and six vehicle stacking between the parties. Said conclusion drawn to support the finding of

fact. The court could equally have concluded that the insurance carrier was seeking to cut its losses, and had similar intent when the insurance carrier settled the claim of Officer Pepe while Officer Pepe's appeal was before this court in 1986 as a companion case to that of Wilson and thereafter prevented disclosure of the terms of the Pepe settlement. It is unreasonable for the reason that Wilson had disclosed in arbitration that he had personal uninsured motorist coverage in the amount of $80,000, which was reduced to $25,000. by the worker's compensation offset. Both carriers have overlapped the deduction. This carrier admitted Wilson's damages were $350,000. The 25,000., the Workers Compensation and the $240,000. substantially compensate Wilson almost in full, if paid. The court was told that Wilson was being reas-

onable. The statement was true. Instead, without the record of the arbitrators hearing, the court has attempted to justify its findings. The court does not know who proposed the agreement or why. Wilson could not know that the insurance carrier would attempt to proceed in this court without a record, and the inner thinking of this court on such matters would not be anticipated by outsiders.

Legal Authority

P.B. §4122, Styles v. Tyler, 64 Conn. 432. Secondino v. New Haven Gas Co., 147 Conn. 642, Contract Clause and Fifth and Fourteenth Amendments to the Constitution of the United States, Article I, Sec. 10 of the Constitution of Connecticut, Blue Sky Bar, Inc. v. Stratford, 203 Conn. 14, 27. New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed. 2d 511; Cyphers v. Allyn, 142 Conn. 669, 705, 118 A.2d

318 (1955); Brunswick Corporation v. Liquor Control Commission, 184 Conn. 75, at 81.

Respectfully submitted
The Defendant
James Wilson

By: DAVID M. REILLY
139 Orange Street
New Haven, CT. 06510
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Juris: 049416

Exerpts from Wilsons preliminary statement of issues filed with Connecticut Supreme Court:

STATEMENT OF ISSUES ON CROSS APPEAL
and
COUNTER STATEMENT OF ISSUES ON APPEAL

Part II: Counter Statement of Issues on Appeal.

1. [omitted]

2. Did the plaintiff properly raise the issues set forth in its statement of issues by presenting only evidence of arbitrator's decision and the policy, which was a standard form contract of adhesion containing Uninsured Motorist coverage provisions apparently written for the standard family automobile policy and by affirmatively inducing the Trial Court to sustain objection to the presentation of further evidence offered by the defendant.

.....

.....

13. What is the standard of review when the insurance carrier does not pray for review de novo, and makes claim that defendant insured is not entitled to a rehearing of the facts, and has no right to present proof of the content of the evidence before the arbitrators and no right to show that the undisputed, uncontroverted proof supported the decision of the arbitrators, and instead seeks to impose arbitrary limits upon the scope of review sought.

14. Did plaintiff fail to prove its case by failing to present evidence of the proceedings before the arbitrators.

15. Would a decision for the plaintiff on the theory of case presented by plaintiff have denied defendant a fair trial and denied due process of law as required by State and United States Constitutions.

(3)

No. 91-696

Supreme Court, U.S.
FILED
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In The

Supreme Court Of The United States

October Term, 1991

JAMES WILSON,
Petitioner

v.

SECURITY INSURANCE CO.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT
(Docket 13618)

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the petition for Writ of Certiorari untimely?

2. Did the Connecticut Supreme Court deprive the petitioner of due process of law in *Wilson v. Security Ins. Co.*, 213 Conn. 532, 569 A.2d 40 (1990), by ordering judgment to be entered for the respondent based upon the Court's conclusion of law that stacking of uninsured motorist coverage on multiple vehicles under the fleet policy in question was not an objectively reasonable expectation of the parties to the contract?

PARTIES TO THE PROCEEDING

Petitioner: James Wilson

Respondent: Security Insurance Company

Parent Company: Orion Group

Subsidiaries: Fire and Casualty Insurance Company of Connecticut

Texas Lloyds

Connecticut Indemnity

Security Reinsurance

Connecticut Specialty Insurance Group

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CITATION OF JUDGMENTS BELOW

(not cited by petitioner)

1. Denial of Motion for Judgment, App. 2A.

STATUTE INVOLVED

28 U.S.C. § 2101(c)

CONCISE STATEMENT OF THE CASE

In 1983 Wilson, the Petitioner, brought an uninsured motorist arbitration proceeding for personal injuries against Security Insurance Co., the Respondent. A majority of the arbitration panel awarded Wilson $240,000 less a workers' compensation offset of $74,033.39. In its August 18, 1988 application to the Connecticut Superior Court to vacate the uninsured motorist arbitration award, Security stated that it "moves the Court to vacate the majority award for the reason that said award was based on an erroneous interpretation of Connecticut law and therefore exceeded the arbitrators' powers." (Petitioner's App. 49). On September 12, 1988 Security filed an amendment to its application enumerating two specific claims of legal error: the majority of the panel of arbitrators erred as a matter of law in interpreting the insurance policy in question to conclude (a) that Wilson was a named insured under the policy; and (b) that Wilson was entitled to stack coverage of six vehicles insured under the fleet policy at $40,000 per vehicle to obtain a maximum limit of $240,000.00 (App. 1A).

The two issues raised by Security in its amended application to vacate are the precise issues it raised before the Connecticut Supreme Court (Petitioner's App. 15). The Connecticut Supreme Court held that as a matter of law the stacking of uninsured motorist coverage for multiple vehicles in-

sured under a fleet automobile liability policy is not permitted (Petitioner's App. 15). Because of its resolution of the fleet stacking issue, the Connecticut Supreme Court declined to reach Security's first issue (Petitioner's App. 15).

Wilson challenged Security's right to a workers' compensation setoff in an appeal from the denial of his Motion to Correct the Arbitration award but lost on that issue. That appeal was treated as a cross appeal by the Connecticut Supreme Court (Petitioner's App. 19).

The Connecticut Supreme Court passed on all the federal questions now raised by the petitioner when it found for the respondent.

This decision was rendered on January 30, 1990. The Connecticut Supreme Court denied Wilson's Motion to Reargue on February 21, 1990 (Petitioner's App. 51). On May 21, 1990, Wilson filed a petition for Writ of Certiorari (No. 89-1808) from the Connecticut Supreme Court's decision. That petition was denied October 1, 1990. 111 S.Ct. 52.

In its decision rendered January 30, 1990, the Connecticut Supreme Court remanded the matter with direction to vacate the judgment and to modify the arbitration award to reflect uninsured motorist coverage in the amount of $40,000. The Court found no error on the cross appeal (Petitioner's App. 19). That decision was rendered on January 30, 1990.

As a result of the Court's decision, the total amount of coverage available to Wilson was $40,000. However, $74,033.39 in workers' compensation benefits had been paid to Wilson (Petitioner's App. 14). Under the policy, that amount was setoff against any coverage available (Petitioner's App. 38). Although the trial court modified the arbitration award to reflect uninsured motorist coverage of $40,000, it refused to enter judgment for Security because the remand order had no such instructions (App. 3A). Security filed a motion in the

Connecticut Supreme Court, requesting it to exercise its supervisory powers and order the trial court to enter judgment for Security (Petitioner's App. 2). The basis of that motion was that the trial court, pursuant to the Court's remand, had the authority to make an undisputed mathematical calculation by subtracting the setoff of $74,033.39 from the coverage of $40,000, with the result that Security was entitled to judgment as the setoff exceeded coverage (Petitioner's App. 7-9). That motion was granted on July 9, 1991 (Petitioner's App. 1). Wilson has again filed a Petition for Writ of Certiorari, raising one of the same issues (and abandoning the other) contained in his prior petition.

ARGUMENT

1. Timeliness

The Connecticut Supreme Court resolved both the issue of fleet coverage and the issue of a workers' compensation setoff against Wilson in its decision entered January 30, 1990. Wilson's motion for reargument of that decision was denied on February 21, 1990. Indeed, Wilson petitioned this Court for a Writ of Certiorari on May 21, 1990 challenging the Connecticut decision on several grounds, including the same due process challenge he again raises in the pending petition. The first petition was denied on October 1, 1991. 111 S.Ct. 52.

Security's Motion for Exercise of Supervisory Powers sought to enforce and not alter the Connecticut Supreme Court's decision. The basis of that motion was that the trial court misunderstood the remand which did in fact require judgment for Security. The decision entered on January 30, 1990 held that coverage was limited to $40,000. The only change ordered in the arbitration award was the reduction of coverage to $40,000. The finding by the arbitrators that there was a workers' compensation setoff of $74,033.39 against the coverage provided under Security's policy was not disturbed. The entry of judgment therefore was a matter of simple mathematics ($40,000−$74,033.39 = no coverage available).

The Motion for Exercise of Supervisory Powers did not seek an "alteration of the rights adjudicated" and therefore did not suspend the judgment's finality for purposes of petitioning for a writ of certiorari. See *Missouri v. Jenkins*, ____ U.S. ____, 110 S.Ct. 1651, 1660, n. 13, 109 L.Ed.2d 31 (1990); *FCC v. League of Women Voters of California*, 468 U.S. 364, 373, n. 10, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984); *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211, 73 S.Ct. 245, 97 L.Ed. 245 (1952). That being so, the petition is untimely under 28 U.S.C. § 2101(c) and should be dismissed.

2. Record for Review

Wilson's argument appears to be comprised of two claims which he raised in his previous petition. The first is that the Connecticut Supreme Court had an insufficient factual record before it to decide the fleet stacking issue and that the Court therefore made its own findings of fact.[1] Wilson is wrong on both points.

To decide whether fleet stacking was permissible the Court had to construe the policy under which Wilson made a claim. There is no dispute that the entire policy was part of the record before the trial court and the Connecticut Supreme Court. Wilson's complaint that the Court lacked evidence of the subjective expectation of the parties ignores the Court's holding that "'[t]he notion of 'stacking' as an objectively reasonable expectation of the parties [did] not . . . extend to fleet insurance contracts.' *Cohn v. Aetna Ins. Co.*, [213 Conn. 525, 530, 569 A.2d 541 (1990)]." (Petitioner's App. 15). The parties' subjective intent is irrelevant under the objective standard used by the Connecticut Supreme Court.

The reviewing Court made no findings of fact. Rather, the Court reviewed the terms of the policy, noting that stacking would mean that the Town of Woodbridge had purchased $38,440,000 worth of uninsured motorist coverage for a premium of $137 (Petitioner's App. 16). The Court concluded that as a matter of law such an expectation is not reasonable under the terms of the policy (Petitioner's App. 16).

---

[1] Wilson misstates the standard of review in uninsured motorist cases. In *American Universal Ins. Co. v. DelGreco*, 205 Conn. 175, 184-91, 550 A.2d 171 (1987), the Connecticut Supreme Court held that de novo review of the interpretation and application of the law by the arbitrators is required. That is the standard the Connecticut Supreme Court applied here. Petitioner also cites *Chmielewski v. Aetna Casualty and Surety Co.*, 218 Conn. 646, 591 A.2d 101 (1991), which adopts a substantial evidence standard of review of factual findings in compulsory arbitration cases. That case is inapplicable here because there were no issues of fact before the Court.

As for the workers' compensation setoff, Wilson challenged its validity in his cross appeal. That issue was resolved against him (Petitioner's App. 16-19). Wilson offers no authority which supports his right to relitigate that claim.

That Wilson disagrees with the Court's conclusion cannot transform his claims into a due process violation. Wilson's right to due process cannot have been violated on the basis that evidence irrelevant to the Court's ultimate conclusion was not presented to the Court.

3. Lack of Significance of Issues

Rule 10 states that a petition should be granted only for "special and important reasons." Three such reasons would be if the Connecticut Supreme Court's decision on a federal question conflicted with a decision of another state's highest court or a federal court of appeals, or if the Connecticut Supreme Court had decided an important unsettled issue of federal law, or if it had decided an important issue of federal law in conflict with decisions of this Court. Rule 10(b), (c).

In Wilson's 27-page petition, there is no citation of any case from another state. It is not until page 24 that any federal cases are cited. Those cases are all cited for general propositions governing the conduct of consensual arbitration hearings, review of awards rendered pursuant to such hearings, and review of administrative agency decisions under the APA. That is all. The Connecticut Supreme Court determined that it had an adequate record to decide de novo the issues of law arising from the compulsory arbitration between these parties. Wilson has not shown that this decision conflicts with the decisions of any other court or that it raises an important federal issue, unsettled or otherwise.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

No. 91-696

In The

Supreme Court Of The United States

October Term, 1991

JAMES WILSON,

Petitioner

v.

SECURITY INSURANCE CO.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

(Docket 13618)

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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CV 88 274461	: SUPERIOR COURT
SECURITY INSURANCE GROUP	: JUDICIAL DISTRICT OF NEW HAVEN
VS.	AT NEW HAVEN
JAMES WILSON	: SEPTEMBER 12,1988

AMENDED APPLICATION TO VACATE ARBITRATION AWARD

The Plaintiff hereby amends its Application to Vacate Arbitration Award dated August 18, 1988 by adding the following paragraphs:

5. The majority erred as a matter of law in interpreting the policy identified as Exhibit A attached to the Plaintiff's original Application dated 8/18/88 and concluding that:

(a) the Defendant was a named insured under the policy; and

(b) the Defendant was entitled to stack coverage of six vehicles insured under this fleet policy to obtain a maximum limit of $240,000.

PLAINTIFF, SECURITY INSURANCE GROUP

By /s/ Susan M. Cormier

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ORAL JUDGMENT DENYING RESPONDENT'S MOTION FOR JUDGMENT

(Excerpt from 6/11/91 Hearing)

* * *

MS. CORMIER: Yes, your Honor, that's my point is that the original arbitration award specifically found a set up of $74,000, the Supreme Court noted that in the decision. Attorney Reilly, Wilson, cross appealed and there was no error. And therefore our position is that the arbitration award in effect, as your Honor corrected it –

THE COURT: Is $35,000.

MS. CORMIER: Is zero.

THE COURT: Is zero?

MS. CORMIER: Because there's coverage of $40,000, there's a set off of $74,000.

THE COURT: Yes.

MS. CORMIER: And your Honor all we're asking is for this Court to say I do this math and judgment is entered for Security, for the reason I think is obvious, your Honor, is that my understanding is that the Supreme Court decision ended the matter. Attorney Reilly –

THE COURT: My understanding –

MS. CORMIER: Attorney Reilly really has a different understanding, that's why, your Honor, I'm trying to get your Honor to make those mathematical corrections. And I would also refer this to the Court to Chmielewski, in which the Supreme Court said the trial court should have modified the award to reflect certain findings, similar types of findings about comparative negligence and credits.

THE COURT: All right. That request is denied also. I'm going to follow exactly what the remand order is, if the Supreme Court wanted the trial court to take some other action the Supreme Court could have directed the trial court to do that.

MR. REILLY: Your Honor, stated that there was a judgment entered 1990?

THE COURT: That's my – that's the note. The judgment was entered on March 19, 1990, immediately – well, not immediately but fairly close to the date of remand.

MS. CORMIER: Yes, your Honor, the Court set it down for a special hearing on its own when you got the remand and that was entered at that time, yes.

THE COURT: The motion to reargue is denied and the motion of Security Insurance to make enter any further judgment is also denied.

Thank you, counsel.

* * *

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

* * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * *

Supreme Court, U.S.
FILED
NOV 29 1991
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(4)

No. 91-696

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES WILSON
Petitioner

v.

SECURITY INSURANCE CO.
Respondent

On Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1. RE PART I OF RESPONDENT'S ARGUMENT

The order of the Connecticut Supreme Court creates a new and distinct reason for granting the Petition for Certiorari as well as stating that its prior order was final. The Petitioner disputes Respondent's claim that simple mathematics can resolve issues by the alleged equation of "$40,000.00-$74,033.39 = No Coverage." The Petitioner has been deprived unconstitutionally of showing that evidence would support the available equation: "$40,000.00 less ($40,000.00 divided by $120,000.00 times $74,033.39) = $15,322.30" not only by a decision entered without a factual record, but now by deprivation of further proceedings in arbitration. Petitioner is deprived of due process without exigent reasons by

the denial of opportunity to prove the deduction is subject to apportionment between Respondent and AMICA Insurance and that combined coverage amounted to $120,000.00 and that AMICA took its fair share of that deduction.

The mathematics used by Respondent is available only because the trial court did not permit evidence of the proceedings in arbitration and evidence before the arbitrators was not offered by Respondent. Respondent objected to the trial court's receiving any evidence to be offered by petitioner. This objection was sustained over Petitioner's Constitutional argument that due process required the full record, but the trial court rendered its ruling harmless when it ruled that Respondent had not proven its case. The Supreme Court of Connecticut reversed without regard to the absence of opportunity to present evidence.

Procedure in the State court in Connecticut upon a motion to vacate an arbitration award does not provide for responsive pleadings. The Respondent's petition sought only a vacatur and at first did not assert that stacking of coverage was illegal. The time to file formal challenges to the arbitration award expired 30 days after the award. C.G.S. §52-420. There are no rules for pleading to a motion to vacate provided for by the rules of civil procedure contained in the Connecticut Practice Book. The proceeding is not a civil action. Waterbury v. Waterbury Police Union, 176 Conn. 401, 409, 407 A.2d 1013. After the 30 day period following the award of the arbitrators, Respondent moved to amend its complaint to assert stacking was illegal. Its motion was granted. Time for other challenges by Petitioner had expired.

Petitioner's opportunity to challenge the mathematics in the event a successful challenge to the award rested upon his right to a full evidential hearing without pleadings and an opportunity to offer evidence to prove other coverage ought to be considered before a final result is rendered.

Petitioner had a right to assume that if Respondent proved its case with sufficient evidence, the court would grant the insurance company's application to vacate by vacating the award.

The issues between the parties became fully final when an order was entered for judgment for the insurance company as opposed to a vacatur of the award. Prior absence of clarity was prejudicial to Petitioner's ability to establish a final judgment was ordered at the time of first petition.

Where apportionment clauses duly authorized by insurance regulations do not appear in the policy, the deductions taken by insurance carriers from their payments have been shared on pro-rata basis between the insurance carriers. See Bobeck v Public Service Mutual, 38 Conn. Sup. 318, 320, 45 A.2d 602; Forsberg v New Hampshire Ins. Co., 24 Conn. App. 655, ___ A.2d ___. (Forsberg is probably erroneous on other grounds. See Covenant Ins. v Coon, 220 Conn. 30, ___ A.2d ___. This issue is now foreclosed by the order of July 9, 1991 which bars additional arbitration proceedings, and the finality as to this matter was not apparent prior thereto. Had vacatur been granted as prayed for by Respondent, this issue was presentable.

2. RE PART II OF RESPONDENT'S ARGUMENT

The Respondent claims that the Supreme

Court of Connecticut may find and apply an objective test instead of searching out the actual intentions and expectations based upon the negotiations, and intent of the parties and the applicable valid terms of coverage, state statutes and state regulations, and determine by "objective" standards the reasonable expectations of the parties without any evidence justifying the standard of objectivity arrived at.

An objective test arrived at without sufficient evidence is merely arbitrary and therefor a decision arrived at without due process. It is the absence of an opportunity to present evidence that causes a decision to be reached without due process of law. Proposed "objective" standards may be attacked by evidence as well as established by evidence.

By finding of the standard of objectiv-

ity only after trial of the factual issues, and then acting without regard to the evidence presented, the Petitioner is deprived of opportunity to question whether reasonable expectations may be otherwise; as by proof that premium charges need not be related to total possible exposure by proof of instances involving the sale of liability insurance by Lloyds of London covering rented motor bikes with full primary coverage, infinite in amount, for a standard premium of only One Dollar. Also, the petitioner is deprived of opportunity to prove the issuance of other policies in the market place having uninsured motorist coverage demonstrative of the industry offering coverage indicative of intent to provide stacked "fleet" coverage: as for example a Travelers Insurance Company policy covering a fleet of trucks with coverage

applicable in Connecticut in the amount of $20,000/40,000, and, on the same page, separately listed - uninsured motorist coverage applicable in New Hampshire in the amount of $2,000,000.00 per person to show an insurance company's underwriting expectations were that coverage in Connecticut would equal coverage in New Hampshire. Coupled with total absence of proof of the defendant's actual actuarial expectancies at the time the policy was sold, the objective test is arrived at unfairly. The Respondent is unfairly excused from presenting evidence upon which it quoted its premium.

3. That the petition ought to be granted is supported by the decision in Burlington Truck Lines Inc. v. United States, 71 U.S. 156, 168-169, 9 L Ed 2d 207, 215, 83 S Ct 239 (1962), cited in the Petition, and not commented on by

respondent. The issue with respect to due process is in conflict therewith. The fact-finding portion of the trial has been omitted. Before arbitration commenced, the Connecticut Supreme Court denied the Respondent's claim that the issues could be determined based upon the policy alone, without arbitration. Wilson v. Security Insurance Group, 199 Conn. 618, 631, 509 A.2d 467 [1986].

CONCLUSION

The record before the Supreme Court of Connecticut did not justify reversal of the trial court in the exercise of a due process review, nor the entry of judgment terminating rights to policy benefits.

Respectfully submitted

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